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I. Introduction

Although the regulation of deceptive trade practices was at one time primarily within the domain of the Federal Trade Commission, such activities are now subject to scrutiny under state "Little FTC Acts"[1] enacted in all fifty states and the District of Columbia.[2] The

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1. States developed these statutes to protect consumers.

2. ALA. CODE § 8-19-1 (1984); ALASKA STAT. § 45.50.471 (1986); ARIZ. REV. STAT. ANN. § 44-1521 (1987); CAL. CIV. CODE § 1750 (West 1985); COLO. REV. STAT. § 6-1-101 (1986); CONN. GEN. STAT. § 42-110a (West 1987); DEL. CODE ANN. tit. 6, § 2511 (1975); D.C. CODE ANN. § 28-3901 (1981); FLA. STAT. ANN. § 501.201 (West 1988); GA. CODE ANN. § 106-1201 (1984); HAW. REV. STAT. § 481A-1 (1985); IDAHO CODE § 48-601 (1977); ILL.

rise of Little FTC Acts as important litigation weapons in commercial and consumer disputes is based largely on the relatively low standards predicated for determining liability. In addition, Little FTC Acts have attractive remedy provisions that may permit treble damages.[3]

Prior to the enactment of these state consumer protection statutes in the 1960s and 1970s, litigants pursued deceptive trade practice claims in state courts under the traditional common law fraud theory. Due to difficulties encountered in establishing fraudulent intent, many legitimate claims were not appropriately recognized and remedied. In fact, meeting the burden of proof required by the scienter element was viewed as such a significant hurdle in these cases that it served as a litigation deterrent.[4] In particular, individual consumers generally were not equipped with the same contractual and remedial protections accorded business persons through established commercial law. From the consumer perspective, the expectant costs of counsel and litigation, coupled with the uncertainty of proving intent, often required acceptance of the economic reality that it was less expensive to endure the consequences of the deceptive trade practice than to undertake cost prohibitive legal action.

REV. STAT. ch. 121 ½, para. 261-315 (Smith-Hurd Supp. 1989); IND. CODE ANN. § 24-5-1-.5-1 (Burns 1982); IOWA CODE ANN. § 774.16 (West 1979); KAN. STAT. ANN. § 50-623 (1983); KY. REV. STAT. ANN. § 367.110 (Baldwin 1983); LA. REV. STAT. ANN. § 51:1401 (West 1987); ME. REV. STAT. ANN. tit. 5, § 206 (1989); MD. COM. LAW CODE ANN. § 13-101 (1983); MASS. GEN. LAWS ANN. ch. 93A (West 1984); MICH. COMP. LAWS § 445.901 (_____); MINN. STAT. ANN. § 325F (West 1981); MISS. CODE ANN. § 75-24-1 (Supp 1989); MO. ANN. STAT. § 407.010 (Vernon 1979); MONT. CODE ANN. § 30-14-101 (1989); NEB. REV. STAT. § 59-1601 (1988); NEV. REV. STAT. § 598.360 (1987); N.H. REV. STAT. ANN. § 358-A1 (1981); N.J. STAT. ANN. § 56:8-1 (West 1989); N.M. STAT. ANN. § 57-12-1 (1987); N.Y. GEN. BUS. LAW § 349 (McKinney 1988); N.C. GEN. STAT. § 75-1 (1988); N.D. CENT. CODE § 51-15-01 (1989); OHIO REV. CODE ANN. § 1345.01 (Baldwin 1988); OKLA. STAT. ANN. tit. 15, § 751 (West Supp. 1990); OR. REV. STAT. § 646.605 (1987); PA. STAT. ANN. tit. 73, § 201-1 (Purdon 1971); R.I. GEN. LAWS § 6-13.1-1 (1985); S.C. CODE ANN. § 39-5-10 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 37-24-1 (1986); TENN. CODE ANN. § 47-18-101 (1988); TEX. BUS. & COM. CODE ANN. tit. 2, § 17.41 (Vernon 1987); UTAH CODE ANN. § 13-11-1 (1986); VT. STAT. ANN. tit. 9, § 2451(a) (1984); VA. CODE ANN. § 59.1-196 (_____); WASH. REV. CODE § 19.86.010 (1989); W. VA. CODE § 46A-6-101 (1986); WIS. STAT. ANN. § 100.18 (West 1988); WYO. STAT. § 40-12-101 (1977).

3. Consumer Protection Acts that permit treble damages include the following states: Alabama, Alaska, Delaware, Georgia, Hawaii, Louisiana, Massachusetts, Montana, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Utah, and Vermont. Additionally, the following state statutes also include a punitive damages provision: California, Connecticut, Idaho, Kentucky, Missouri, Oregon, and Rhode Island.

4. The early reliance on the doctrine of caveat emptor in the common law was primarily responsible for this reality in commercial law litigation. For a discussion of the development of the doctrine of caveat emptor as related to the development of state and federal regulatory policy regarding trade practice, see Lovett, *State Deceptive Trade Practice Legislation*, 46 TULANE L. REV. 724, 726-31 (1972).

The passage of state Little FTC Acts was in large part a response to the deficiencies in the common law as well as the limited reach of the Federal Trade Commission Act (FTCA).[5] Courts interpreted the FTCA's section 5[6] enforcement power narrowly to encompass only anti-competitive practices between businesses. This interpretation eliminated any prospect that the FTCA would be broadly construed for the benefit of consumers.[7] In 1938, Congress amended section 5 of the FTCA to bring within the purview of the Federal Trade Commission (FTC or Commission) any "unfair or deceptive acts or practices in or affecting commerce . . . ."[8] This significant addition was supported by legislative history that evidenced a clear intent that the Commission vigorously pursue questionable trade practices that adversely affected consumers, regardless of any resultant impact on competitive businesses.[9] Despite this clearly pro-consumer move, however, the FTCA has never allowed a private right of action for either consumer or business litigants. On this point the FTCA and state Little FTC Acts differ markedly. A number of state statutes not only provide private plaintiffs with the right to pursue a cause of action, but also permit recovery of attorneys' fees and court costs.[10]

Although the evolution of Little FTC Acts is in part attributable to the FTCA, the Unfair Trade Practices and Consumer Protec-

5. Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41-58 (1982) [hereinafter FTCA].

6. As enacted in 1914, FTCA § 5 stated "that unfair methods of competition in commerce are hereby declared unlawful. The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce." FTCA, ch. 311, § 5, 38 Stat. 719 (1914).

7. In FTC v. Raladam, 283 U.S. 643 (1931), the United States Supreme Court provided its initial interpretation of the Commission's § 5 power:

> It is obvious that the word "competition" imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors - that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured . . . .

Id. at 649.

8. Wheeler-Lea Act of 1938, ch. 49, § 3, 52 Stat. 111 (1938) (current version at 15 U.S.C. § 45 (1982)).

9. *See* 83 CONG. REC. 3256 (1938) (comments of Senator Wheeler, co-sponsor of the Wheeler-Lea Act of 1938). For a comparison of Little FTC Acts with respect to attorney fees, punitive damages, treble damages, and merchant plaintiff status, see Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TULANE L. REV. 427, 441-47 (1984).

10. These states include: Alabama, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin.

tion Law (UTPL)[11] also influenced the states' choice of specific statutory language. The Committee on Suggested State Legislation of the Council of State Governments and the Federal Trade Commission formulated the UTPL model law.[12] This model act suggested three alternatives for defining the scope of the trade practices and business activities to be regulated by state consumer protection acts. One formulation was identical to the FTCA's prohibition of "unfair methods of competition" and "unfair or deceptive acts or practices" in or affecting commerce.[13] Another version focused on "false, misleading, or deceptive acts or practices."[14] The third approach suggested the listing of specific trade practices to be deemed unlawful.[15]

The effort to regulate trade practices within each state has been sharply defined by the legislatures' decision to adopt one of the three UTPL recommended statutory alternatives. Of particular interest are those Little FTC Acts that incorporate language tracking the FTCA's general proscription of unfair and deceptive trade practices. Just as the federal act does not provide working definitions for what

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11. COUNCIL OF STATE GOVERNMENTS, 1970 SUGGESTED LEGISLATION: UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW—REVISION, *reprinted in* Clearinghouse No. 31, 035B.

12. For a complete discussion of the UTPL, see Lovett, *State Deceptive Trade Practice Legislation*, 46 TULANE L. REV. 724, 731-34 (1972).

13. COUNCIL OF STATE GOVERNMENTS, *supra* note 11, at 2.

14. *Id.* at 6.

15. The suggested prohibited trade practices include:

(1) Passing off goods or services as those of another;

(2) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) Causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;

(4) Using deceptive representations or designations of geographic origin in connection with goods or services;

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

(6) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or second-hand;

(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) Disparaging the goods, services, or business of another by false or misleading representation of fact;

(9) Advertising goods or services with intent not to sale them as advertised;

(10) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement disclosed a limitation of quantity;

(11) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(12) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

Id. at 6-7.

will constitute an unfair or deceptive trade practice, these state statutes generally do not provide any guidance in answering the question.

At the federal level, case law remedied the statute's failure to establish a burden of proof regarding deception by adoption of the so-called "tendency or capacity to deceive" standard. Originally recognized by the FTC and the United States Supreme Court in *FTC v. Algoma Lumber Co.*,[16] this standard provided that any trade practice having the tendency or capacity to deceive would be held violative of FTCA section 5.[17]

Commission application of this standard of proof went essentially unchallenged until 1981, when President Reagan appointed James C. Miller, III, as FTC Chairman. Miller openly advocated statutorily defining the term deceptive but was unsuccessful in convincing Congress to make such a change.[18] The primary thrust of Miller's argument was that Commission accountability and judicial review would be enhanced:

> A statutory definition will promote accountability . . . because the Commissioners decide for themselves how they want to use their broad discretion. And when the composition of the Commission changes, so too do the standards.
>
> Moreover, a statutory definition will facilitate judicial review. Courts routinely defer to the decisions of the Commission regarding deception. This is one reason why "the Commission has managed to prevail in the appellate courts in the overwhelming majority of its [deception] decisions that have been ap-

16. 291 U.S. 67, 81 (1934).

17. *Id.* American Home Prods. Corp. v. FTC, 695 F.2d 681, 687 (3d Cir. 1982) ("[T]he Commission need not buttress its findings that an advertisement has the inherent capacity to deceive with evidence of actual deception."); Simeon Management Corp. v. FTC, 579 F.2d 1137, 1146 n.11 (9th Cir. 1978) ("Advertisements having the capacity to deceive are deceptive within the meaning of the FTCA . . . ."); Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977) ("[T]he Commission was entitled to conclude from the advertisements themselves and stipulation of fact that the ads had a tendency or capacity to mislead consumers."); Beneficial Corp. v. FTC, 542 F.2d 611, 617 (3d Cir. 1976), *cert denied*, 430 U.S. 983 (1977) ("[T]he likelihood or propensity of deception is the criterion by which advertising is measured."); Doherty, Clifford, Steers & Shenfield, Inc. v. FTC, 392 F.2d 921, 925 (6th Cir. 1968) (It is the function of the Commission to determine "[t]he meaning of advertisements or other representations to the public, and their tendency or capacity to mislead or deceive . . . .") (citing Carter Prods., Inc. v. FTC, 323 F.2d 523, 528 (5th Cir. 1963); Montgomery Ward & Co. v. FTC, 379 F.2d 667, 670 (7th Cir. 1967) ("[T]he likelihood of deception or the capacity to deceive is the criterion by which the advertising is judged."); *see also* Goodman v. FTC, 244 F.2d 584 (9th Cir. 1957); Kalwajtys v. FTC, 237 F.2d 654 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (3d Cir. 1944); General Motors Corp. v. FTC, 114 F.2d 33 (2d Cir.), *cert. denied*, 312 U.S. 682 (1940).

18. *See infra* notes 67-75 and accompanying text.

> pealed." A statutory definition will provide guidance to the courts by spelling out the standards upon which their review should be based.[19]

Since Miller was unable to secure a statutory amendment, he and two other commissioners authored a *Deception Policy Statement*,[20] which was issued in October 1983 and subsequently ratified in the *Cliffdale Associates*[21] case, as the new Commission standard for regulating deceptive trade practices. The three commissioners replaced the traditional tendency or capacity to deceive standard with the definition of a deceptive act as "a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[22] There is considerable disagreement among commentators as to whether the *Cliffdale* standard has resulted in any profound change to the federal law of deception, with detractors noting that the new reasonable consumer standard dilutes the Commission's previous pro-consumer position.[23] What has not been similarly reviewed and debated, however, is the resultant impact of the *Cliffdale* deception standard on comparable state regulatory policy via Little FTC Acts.

This question is particularly significant due to the indirect influence that the FTC has had in shaping policies in those states that have general statutory provisions modeled after the federal act. Given the volume of federal appellate and Commission case law that

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19. *FTC's Authority Over Deceptive Advertising: Hearings Before the Subcommittee for Consumers of the Committee on Commerce, Science and Transportation*, 97th Cong., 2d Sess. 8-9 (1982) [hereinafter *FTC's Deception Authority Hearings*]. Chairman Miller also discussed consumer confusion with respect to the traditional tendency or capacity to deceive standard:

> There are specific problems with the Commission's definition of deception. First, the definition is not clear, despite its 44 year history. The courts tend to give the Commission very wide latitude, and the Commission's own case law is not clear and consistent. As a result, businesses do not know what they can and cannot do. Consumers do not know what protections they do and do not have. The Commission really does not know what cases to bring and what not to bring, and the courts do not know which Commission decisions to affirm and which to reverse. As a result, they tend to defer to the agency.

Id. at 3.

20. In a letter to United States Congressman John D. Dingell, Chairman of the United States House of Representatives Committee on Energy and Commerce, dated October 14, 1983, Chairman Miller formally presented the *Deception Policy Statement*. The *Deception Policy Statement* appears at 5 Trade Reg. Rep. (CCH) ¶ 50,455 (Oct. 31, 1983); 45 Antitrust & Trade Reg. Rep. (BNA) No. 1137, at 689 (Oct. 27, 1983); and as an appendix to Cliffdale Associates, Inc. 103 F.T.C. 110, 174-84 (1984).

21. 103 F.T.C. 110 (1984).

22. *Id.* at 176.

23. Commissioners Pertschuk and Bailey dissented to the *Deception Policy Statement* and to its application in the *Cliffdale* case. *See Cliffdale*, 103 F.T.C. at 184. *See also* Bailey & Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U.L. REV. 849 (1984).

had previously clarified what constituted a deceptive trade practice, twenty-three states[24] statutorily mandated that courts draw on these interpretations in deciding deception cases. These statutory deference provisions vary widely. Some require state courts to give "consideration"[25] or "due consideration and great weight"[26] to the federal standard; others mandate that state courts be "guided"[27] by FTC and federal court interpretations. In addition, the federal deference provisions of three Little FTC Acts provide that state court interpretations and decisions should be "consistent" with federal standards.[28] At least three states without such statutory deference provisions have judicially noticed the federal deception standard and have relied on it to some extent.[29] Finally, of the twenty-six states that statutorily or judicially recognize a federal deference obligation,[30] eight states also direct that state enforcement policies, rules, and regulations be "consistent" with the federal position.[31]

This Article briefly reviews the development of the traditional federal deception standard and the disputed change arguably effected by the *Cliffdale* case. Next, the impact of the change in federal standards on state regulatory policy is measured in accordance with Little FTC Acts that have incorporated federal deference provi-

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24. ALA. CODE § 8-19-6 (1984 & Supp. 1987); ALASKA STAT. § 45.50.545 (1986 & Supp. 1987); ARIZ. REV. STAT. ANN. § 44-1522 (1987); CONN. GEN. STAT. ANN. § 42-1106 (West Supp. 1987); FLA. STAT. ANN. § 501.204 (West 1972 & Supp. 1987); GA. CODE ANN. § 10-1-391 (1981 & Supp. 1987); IDAHO CODE § 48-604 (1977 & Supp. 1987); ILL. ANN. STAT. ch. 121 ½, para. 262 (Smith-Hurd 1960 & Supp. 1987); ME. REV. STAT. ANN. tit. 5, § 207(1) (1979 & Supp. 1987); MD. COM. LAW CODE ANN. § 13-103 (1983 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 93A: 2(b,c) (West 1988); MONT. CODE ANN. § 30-14-104 (1987); N.H. REV. STAT. ANN. § 358-A:13 (1984 & Supp. 1987); N.M. STAT. ANN. § 57-12-4 (1987); OHIO REV. CODE ANN. § 1345.02(c) (Anderson 1979 & Supp. 1986); R.I. GEN. LAWS § 6-13.1-3 (1985 & Supp. 1989); S.C. CODE ANN. § 39-5-20(b) (Law. Co-op. 1976 & Supp. 1987); TENN. CODE ANN. § 47-18-115 (1984 & Supp. 1987); TEX. BUS. & COM. CODE ANN. § 17.46(c)(1) (Vernon Supp. 1987); UTAH CODE ANN. § 13-11-2(4) (1986 & Supp. 1987); VT. STAT. ANN. tit. 9, § 2453(b) (1984 & Supp. 1987); WASH. REV. CODE ANN. § 19.86.920 (1989); W. VA. CODE § 46A-6-101 (1986 & Supp. 1987).

25. *See, e.g.*, ILL. ANN. STAT. ch. 121 ½, para. 262 (Smith-Hurd Supp. 1987).

26. These states include Alabama, Alaska, Florida, Idaho, Maryland, Montana, Ohio, and Rhode Island. *See supra* note 24 for citations to these states' statutes.

27. These states include Arizona, Connecticut, Maine, Massachusetts, New Hampshire, New Mexico, South Carolina, Texas, Vermont, Washington, and West Virginia. *See supra* note 24.

28. These states include Georgia, Tennessee, and Utah. *See supra* note 24.

29. These states include Louisiana, North Carolina, and Pennsylvania.

30. *See supra* notes 24, 29.

31. These states include Connecticut (rules established by the Commissioner of Consumer Protection), Florida (rules established by Department of Health and Rehabilitative Services), Idaho (rules established by the Attorney General), Maine (rules established by the Attorney General), Massachusetts (rules established by the Attorney General), Montana (rules established by the Department of Commerce), Vermont (rules established by the Attorney General), and West Virginia (rules established by the Attorney General).

sions. To this end, this Article undertakes a thorough review of state case law to determine: (1) whether state courts have discerned or are likely to discern any major shift in federal deception enforcement policy as a result of the *Cliffdale* decision; (2) the likelihood that these deference states will choose to follow the federal lead; and (3) the obstacles faced by commercial enterprises given potentially conflicting state and federal deception regulatory policies. Appendices A and B provide a summary of this Article in chart format.

II. Development of the Federal Deception Standard

The genesis of the Commission's traditional deception standard can be traced to the *Algoma Lumber Co.*[32] case decided in 1934. Since Congress had not yet passed the Wheeler-Lea Act,[33] the Supreme Court was asked to rule on a decision by the Federal Trade Commission that a trade practice was anti-competitive and, therefore, a violation of FTCA's section 5 unfair methods of competition provision.[34] The Court held that the practice in question violated section 5 because the practice had a "capacity to deceive."[35] After reviewing the Federal Trade Commission Act and finding that Congress provided no specific guidance on what would constitute an anti-competitive trade practice, the Court's holding indirectly laid the foundation for the yet to be recognized federal deception standard.

The future case law development of the federal deception standard was assured in 1938 when Congress passed the Wheeler-Lea Act, thereby amending section 5 of the FTCA to prohibit deceptive trade practices that did not necessarily impact on competing businesses.[36] This statutory amendment, which did not include a definition of deception,[37] positioned the FTC to regulate trade practices

32. 291 U.S. 67 (1934).

33. Wheeler-Lea Act of 1938, ch. 49, § 3, 52 Stat. 111 (1938) (current version at 15 U.S.C. § 45 (1982)).

34. 291 U.S. 67, 69 (1934).

35. *Id.* at 81.

36. *See supra* note 8 and accompanying text.

37. The FTCA does provide a statutory definition of false advertising:

> (A) (1) The term "false advertisement" means an advertisement other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual . . . .

15 U.S.C. § 55 (1982).

that were deemed to be unfair, deceptive, or anti-competitive with respect to consumers as well as competing businesses. Through a series of case law decisions from 1938 to 1984, the *Algoma Lumber* rule was refined and traditionally has been referred to as the "tendency or capacity to deceive" test.[38]

A. Tendency or Capacity to Deceive Test

The traditional federal deception standard consisted of three basic components: (1) a trade practice deemed to have a tendency or capacity to deceive;[39] (2) the potential to deceive a member or members of the audience targeted by the trade practice;[40] and (3) a requirement that the practice be material with respect to a consumer's purchase decision.[41] The FTC applied the traditional federal deception standard by evaluating the questioned trade practice in its entirety rather than "emphasizing isolated words or phrases apart from their context."[42] This approach better enabled the FTC to reach conclusions regarding the situation created by the trade practice as a whole, and to decide whether the practice had a tendency or capacity to deceive.

A key feature of the Commission's evaluation of questionable

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38. *See supra* note 17 and accompanying text.

39. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391-92 (1965); FTC v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922); American Home Prods. Corp. v. FTC, 695 F.2d 681, 687 (3d Cir. 1982); TransWorld Accounts, Inc. v. FTC, 594 F.2d 212, 214 (9th Cir. 1979); Simeon Management Corp. v. FTC, 579 F.2d 1137, 1146 n.11 (9th Cir. 1978); Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977); Beneficial Corp. v. FTC, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); Resort Car Rental Sys. v. FTC, 518 F.2d 962, 964 (9th Cir. 1975); Doherty, Clifford Steers & Shenfield, Inc. v. FTC, 392 F.2d 921, 925 (6th Cir. 1968); Montgomery Ward & Co. v. FTC, 379 F.2d 666, 670 (7th Cir. 1967); Goodman v. FTC, 244 F.2d 584, 604 (9th Cir. 1957); Kalwajtys v. FTC, 237 F.2d 654, 656 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957); Rhodes Pharmacal Co. v. FTC, 208 F.2d 382, 385 (7th Cir. 1953), *rev'd on other grounds*, 348 U.S. 940 (1955); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679-80 (2d Cir. 1944); General Motors Corp. v. FTC, 114 F.2d 33, 36 (2d Cir. 1940), *cert. denied*, 312 U.S. 682 (1941).

40. The audience reaction requirement has been variously referred to as the "Substantial percentage," "Substantial portion," "Substantial segment," and "Substantial numbers test." *See* Benrus Watch Co. v. FTC, 352 F.2d 313, 318-20 (8th Cir. 1965) ("Substantial percentage," "Substantial segment"), *cert. denied*, 384 U.S. 939 (1966); Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961) ("Substantial portion"); Kalwajtys v. FTC, 237 F.2d 654, 656 (7th Cir. 1956) ("Substantial portion"), *cert. denied*, 352 U.S. 1025 (1957); Bristol-Myers Co., 85 F.T.C. 688, 744 (1975) ("Substantial number"); Statement of Basis and Purpose, Cigarette Advertising and Labeling Rule, 29 Fed. Reg. 8325, 8350 (1964) ("Substantial segment").

41. Colgate-Palmolive Co. v. FTC, 380 U.S. 374, 391-92 (1965); Raymond Lee Org., 92 F.T.C. 489, 649 (1978), *aff'd*, 679 F.2d 905 (D.C. Cir. 1980); Firestone Tire & Rubber Co., 81 F.T.C. 398, 451 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

42. Beneficial Corp. v. FTC, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). *See also* American Home Prods. Corp. v. FTC, 695 F.2d 681, 688 (3d Cir. 1982); FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963).

trade practices under this standard was that the practice need only have a potential to create deception in the minds of consumers or business competitors. The FTC never required that a person or business entity had been actually deceived by the challenged trade practice.[43] In *Montgomery Ward & Co. v. FTC*,[44] the Commission stated: "Actual deception, proved by deceived consumers, is not necessary: the likelihood of deception or the capacity to deceive is the criterion by which advertising is judged."[45] By not requiring that actual deception be established, the Commission was able to protect consumers by enjoining questionable trade practices before any individual suffered actual harm.

In another case, business organizations charged with engaging in deceptive trade practices raised a number of defenses, all of which were rejected by the FTC. For example, Ford Motor Co. argued that it had not violated section 5 because it had engaged in an advertising campaign in good faith and any misinterpretations made by consumers should not be attributable to the company.[46] The Commission disposed of this argument, stating:

> The question does not depend upon the purpose of the advertisement nor upon the good or bad faith of the advertiser. The point for consideration here is whether, under the facts and circumstances in connection with the publication of the advertisement, the language in and of itself, *without regard to good or bad faith*, is calculated to deceive the buying public into believing it is purchasing petitioner's cars at one price when in fact it is purchasing them at another.[47]

Likewise, the FTC also rejected arguments by a respondent that liability should not ensue under the traditional federal deception standard when there was no intent to deceive the consuming public.[48] The federal courts consistently upheld the Commission's rulings that "intent to deceive is simply not an element of deception under Sec-

43. American Home Prods. Corp. v. FTC, 695 F.2d 681, 687 (3d Cir. 1982) ("But the Commission need not buttress its findings that an advertisement has the inherent capacity to deceive with evidence of actual deception."); TransWorld Accounts, Inc. v. FTC, 594 F.2d 212, 214 (9th Cir. 1979) ("Proof of actual deception is unnecessary to establish a violation of Section 5.").

44. 379 F.2d 667 (7th Cir. 1967).

45. *Id.* at 670.

46. Ford Motor Co. v. FTC, 120 F.2d 175, 182 (6th Cir. 1941).

47. *Id.* at 181. *See also* Chrysler Corp. v. FTC, 561 F.2d 357, 363 n.5 (D.C. Cir. 1977); Doherty, Clifford, Steers & Shenfield, Inc. v. FTC, 392 F.2d 921, 925 (6th Cir. 1968); Feil v. FTC, 285 F.2d 879, 896 (9th Cir. 1960); Koch v. FTC, 206 F.2d 311, 317 (6th Cir. 1953).

48. Statement of Basis and Purpose, Cigarette Advertising and Labeling Rule, 29 Fed. Reg. 8325, 8350 (1964) [hereinafter Advertising and Labeling Rule].

tion 5."[49]

Ambiguous trade practices that result in multiple interpretations by consumers presented a special problem under the traditional federal deception standard. For example, advertisers argued that when an advertisement is capable of being interpreted in both a deceptive and non-deceptive fashion, there is no section 5 violation.[50] The Commission steadfastly refused to accept this argument with respect to ambiguous trade practices. Prior to 1984, the Commission maintained that a consumer oriented protection policy could only be accomplished by construing ambiguities to constitute a violation of the FTCA.[51]

The Commission also ruled that non-disclosure of pertinent information may constitute a section 5 violation if a consumer's purchase decision might have been adversely affected.[52] What is important in non-disclosure or omission cases is that the missing information be deemed material and critical to a consumer's ability to make an informed choice. In *Royal Baking Powder Co v. FTC*,[53] the manufacturer made substantial changes in a product's ingredients but continued to use traditional labeling and advertising, thereby creating the impression that the product remained unchanged.[54] The company argued that the advertisements in question presented no false or misleading information even though most consumers would not be able to immediately recognize that the product had been materially altered.[55] The Commission used this case to develop the "deceptive per se" rule. Violators were permitted to continue the questioned advertising only after complying with an affirmative disclosure order by the Commission that required the missing information to be included in the advertisement in order to eliminate the

49. *See, e.g.*, Travel King, Inc., 86 F.T.C. 715, 773 (1975).

50. National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 161 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

51. The FTC has wide latitude to decide whether a trade practice is potentially deceptive. In one instance, however, the full Commission refused to uphold an administrative law judge's order that a company's product advertisements were ambiguous and therefore deceptive. The company had advertised a toothpaste's ability to remove stains from a glass plate described as "enamel like the hard surface of your teeth." The Commission accepted the argument that the public had not been deceived since the company had never misrepresented or disguised the fact that a glass plate was being used in the advertisements. *Lever Bros. Co.*, 61 F.T.C. 1013, 1020 (1962).

52. J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967); Feil v. FTC, 285 F.2d 879 (9th Cir. 1960); Keele Hair & Scalp Specialist, Inc. v. FTC, 275 F.2d 18 (5th Cir. 1960).

53. 281 F. 744 (2d Cir. 1922).

54. *Id.* at 744-45.

55. *Id.*

potential or capacity for deception.[56]

Finally, the Commissioner considered opinion statements or exaggerated representations to be non-deceptive. The FTC took the position that consumers generally can protect themselves from so called puffing or sales talk.[57] More important, though, was the FTC's insistence that opinion statements be evaluated to determine whether the statement or puff has a capacity for deception. By following this policy, the Commission refused to apply the reasonable person standard of tort law in lieu of its interpretation of what constitutes an exaggeration.[58]

A second factor the Commission used in deciding whether a trade practice violated the traditional deception standard was the reaction of the target audience.[59] The Commission viewed the trade practice in question from the perspective of a consumer within the target audience, rather than considering the possible reaction of all potential consumers.[60] The Commission's rulings reflect a careful decision not to establish any minimum number of consumers required to meet this part of the test, and a recognition that consumers would not always employ sound logic or exceptional reasoning when evaluating a marketing practice.[61] The Commission recognized that buyers normally define words in accordance with ordinary meanings, and formulate purchase decisions according to the complete message

56. *Id.* at 753. The affirmative disclosure order requires a company to either cease the trade practice in question or to include the missing information in future communications with consumers. In several cases, the United States Supreme Court affirmed the authority of the FTC to issue such an order. *See* FTC v. National Lead Co., 352 U.S. 419, 428 (1957); FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952); Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13 (1946).

57. Rachlin v. Libby-Owens-Ford Glass Co., 96 F.2d 597, 599 (2d Cir. 1938).

58. *See FTC's Deception Authority Hearings, supra* note 19, at 11-12.

59. Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942).

60. For example, deceptive advertising practices that target children are evaluated according to the potential impact on that consumer group:

> [I]t has been recognized that minors constitute an especially vulnerable and susceptible class requiring special protection from business practices that would not be unlawful if they only involved adults. Accordingly, a marketing practice, directed in a substantial part toward minors, that interferes substantially and unjustifiably with their freedom of buying choice is an unfair or deceptive act or practice even if it is not especially pernicious to adults.

Advertising and Labeling Rule, *supra* note 46, at 8358. *See also* FTC v. R.F. Keppel & Bros., Inc., 291 U.S. 304, 313 (1933).

61. In Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1942), the court held that the Commission's deception policy should protect even "the ignorant, the unthinking and the credulous." *Id.* at 167. The targeted audience test, which has evolved through a series of Commission and court decisions, has been variously referred to as the "substantial portion" test, Kawajtys v. FTC, 237 F.2d 654, 656 (7th Cir. 1956); "substantial percentage" or "substantial segment" test, Benrus Watch Co. v. FTC, 352 F.2d 313, 318-20 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); and the "substantial number" test, Bristol-Myers Co. v. FTC, 85 F.T.C. 688, 744 (1975).

that is conveyed.[62] The courts upheld the FTC's view of the target audience and refused to require the agency to adopt the reasonable person standard as the method to measure consumer reaction.[63]

Finally, the traditional federal deception standard required that a trade practice include a misrepresentation that was material before the FTC would consider the practice to have a tendency or capacity to deceive.[64] This materiality requirement focused on the amount and quality of information on which a consumer relied in making a purchase decision.[65] In order to conclude that the questioned practice was material, it was not necessary for the FTC to demonstrate that a consumer had suffered an actual injury or that there had been actual reliance on the misrepresentation.[66]

B. The FTC's 1983 Deception Policy Statement

After becoming Chairman of the Federal Trade Commission in 1981, James Miller publicly stated his preference for displacing the traditional case law deception standard with a statutory version. During 1982, Miller appeared before Congress on several occasions strongly advocating that Congress amend section 5 of the FTCA.[67] He characterized the Commission's deception enforcement policy as inconsistent and ill-defined.[68] Miller believed that it was improper

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62. Carter Prods. v. FTC, 323 F.2d 523, 528 (5th Cir. 1963).

63. Historically the courts have deferred to the Federal Trade Commission's judgment relative to what types of conduct constitute a violation of the three part traditional deception standard:

> [A]s an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is "deceptive" within the meaning of the Act. This Court has frequently stated that the Commission's judgment is to be given great weight by reviewing courts. This admonition is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation in this field rests so heavily on inference and pragmatic judgment.

FTC v. Colgate-Palmolive Co., 380 U.S. 374, 384-85 (1965).

64. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 386-87 (1965).

65. *See* Cliffdale Assocs., Inc., 103 F.T.C. 110, 165-66 (1984) ("[A] material representation, omission, act or practice involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product."). *See also Colgate-Palmolive Co.*, 380 U.S. at 391-92.

66. *See supra* notes 43-45 and accompanying text.

67. *See supra* notes 18-19 and accompanying text.

68. Regarding the wide degree of latitude granted the Commission in deception cases, Mr. Miller stated:

> Respected commentators from all portions of the political spectrum have noted with concern the enoromous [sic] discretion entrusted to the Commission. Congress has not provided clear guidance as to which cases the Commission should bring, and which are better left alone. The courts have deferred to the Commission's presumed 'expertise', and have failed to develop clear standards for review. The Commission itself has not clearly articulated, or consistently followed, any set of limiting principles.

for the Commission to hold a trade practice deceptive simply because the practice has a potential to mislead a consumer who was not acting in a reasonable fashion.[69] In 1983, after Congress refused to define legislatively what would constitute a deceptive trade practice, Miller and the two other majority commissioners of the FTC issued the Commission's *Deception Policy Statement*.[70] The Commission provided this *Statement* in response to a request by the House Committee on Commerce that the FTC delineate its current deception policy program. The *Deception Policy Statement* clearly rejected the federal case law deception standard in favor of defining a deceptive practice as "a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[71] To support the reformulated test, which focused on the reasonable consumer, Chairman Miller relied on the same case law that developed the tendency or capacity to deceive standard. Miller argued that the likely to mislead requirement had a historical basis, and was not contrary to the traditional rule that actual deception was not necessary in order for the Commission to bring a deception action.[72]

Reaction to the *Deception Policy Statement* was immediate. In addition to the dissenting opinions of the two minority commissioners,[73] Congress rejected the report as biased and non-neutral.[74] Despite the fact that Chairman Miller responded to the congressional criticism,[75] Miller had no intention of abandoning his position as pri-

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FTC's Deception Authority Hearings, supra note 19, at 13.

69. *Id.* at 13-14.

70. *See supra* notes 20-22 and accompanying text.

71. *See* Cliffdale Assocs., Inc., 103 F.T.C. 110, 177 (1984) (*Deception Policy Statement* appendixed to case).

72. The majority commissioners who authored the *Deception Policy Statement* relied primarily on two cases to document the claim that the new standard did not abrogate the traditional test: Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976), and *In re* Kirchner, 63 F.T.C. 1282 (1963). *See Cliffdale Assocs.*, 103 F.T.C. at 181.

73. Cliffdale Assocs., Inc., 103 F.T.C. 110, 184 (1984) (Commisioner Pertschuk concurring in part and dissenting in part); *Id.* at 189 (Commissioner Bailey concurring in part and dissenting in part).

74. Representative John Dingell, Chairman of the House Oversight Committee, expressed criticism in a letter written to Chairman Miller:

> You were directed to provide a definitive neutral analysis of a nearly 50-year old body of consumer protection law that has served as a model for the states and for this nation. We requested a disciplined in-depth review of what decades of case law stand for, and of the nature and amount of evidence and deception considered by the Commission during 50 years of litigation in the public interest. What you delivered is a document that addresses not what the Commission's deception jurisdiction is, but what some now at the agency want it to be.

5 Trade Reg. Rep. (CCH) ¶ 50,455, at 56,086 (Oct. 31, 1983).

75. *Id.* at 56,086-89.

mary advocate for a revised deception standard based upon reasonable consumer interpretation.

C. *Reasonable Consumer Test*

When Congress again rejected Miller's proposal for a new deception definition as set forth in the *Deception Policy Statement*, the Commission chose to adopt the standard using the traditional case law approach. *Cliffdale Associates, Inc.*[76] was the first deception case decided by the Commission after the issuance of the *Statement*. In *Cliffdale*, the marketing strategy for a product included guarantees that the product would provide automobile owners gas mileage savings if the device was properly attached to the vehicle's engine.[77]

The complaint issued by the FTC charged that the company lacked a reasonable basis to justify and substantiate the scientific tests upon which the marketing claims were based.[78] A hearing was held before an Administrative Law Judge (ALJ), who ruled that Cliffdale's advertisements constituted a deception under the traditional tendency or capacity to deceive standard.[79]

When the ALJ's decision was appealed to the full Commission, a three member majority upheld the result, but reversed the part of the decision that cited the capacity to deceive standard as the appropriate precedent.[80] Former Chairman Miller, the author of the majority opinion, overturned the traditional standard, terming it "circular."[81] He stated that in future cases the Commission would follow the standard set forth in the *Deception Policy Statement*, and that a trade act or practice would be considered deceptive if "first, there is a representation, omission, or practice that, second is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material."[82] The

76. 103 F.T.C. 110 (1984).
77. *Id.* at 163 (opinion of the Commission).
78. *Id.*
79. *Id.* at 158 (initial decision by Brown, A.L.J.).
80. Cliffdale Assocs., Inc., 103 F.T.C. 110, 164-65 (1984) (opinion of the Commission).
81. *Id.* at 164 (opinion of the Commission). Miller also stated that the traditional federal deception standard was "inadequate to provide guidance on how the deception claim should be analyzed." *Id.*
82. Cliffdale Assocs., Inc., 103 F.T.C. 110, 165 (1984). Noticeably absent from this new definition was the reference to consumer injury or consumer detriment. The Commission made the consumer injury element a subpart of the materiality requirement and noted that consumers "are likely to suffer injury from a material misrepresentation." *Id.* at 165-66. This particular aspect of the reformulated deception standard had come under especially harsh criticism, thereby prompting Chairman Miller to decide that prudence dictated its exclusion. *Id.* at 188, 196-97 (Pertschuk and Bailey, Commissioners, concurring in part and dissenting in part). Miller reasonably assumed that a consumer injury component might prompt Congressman

Cliffdale reasonable consumer standard has been cited in at least five subsequent FTC decisions as appropriate case law precedent.[83] In each instance, the Commission reviewed and approved the application of the new deception standard.

Vigorous dissents, registered in several of these cases, disputed Miller's contention that *Cliffdale* did not effect any discernible alteration in the Commission's deception enforcement policy.[84] At least one appellate court agreed with these dissenters. In *Southwest Sunsites*[85] the Court of Appeals for the Ninth Circuit affirmed an FTC deception ruling and expressly contradicted Miller's claim that the agency's burden of proof would remain the same under the new deception standard. The court stated:

> Each of the three elements of the new standard challenged by petitioner imposes a greater burden of proof on the FTC to show a violation of Section 5. First, the FTC must show probable, not possible, deception ("*likely* to mislead," not "*tendency and capacity to mislead*"). Second, the FTC must show potential deception of "Consumers acting reasonably in the circumstances," not just any consumers. Third, the new standard considers as material only deceptions that are likely to cause injury to a reasonably relying consumer, whereas the old standard reached deceptions that a consumer might have considered important, whether or not there was reliance.[86]

Given this judicial interpretation, it is appropriate to conclude that the federal deception standard has undergone significant change in light of *Cliffdale*.

III. Adopting the Federal Standard Through Statutory Deference

With the reasonable consumer test firmly established as the federal standard for evaluating potentially deceptive trade acts or practices, the importance of this new deception standard transcends its

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Dingell's Committee to take a closer look at the new case law deception standard and quite possibly compel congressional action that would thwart the effectiveness of the *Cliffdale* precedent.

83. Removatron Int'l Corp., 5 Trade Reg. Rep. (CCH) ¶ 22,619 (FTC Nov. 9, 1988); *In re* Figgie Int'l, Inc., 107 F.T.C. 313 (1986); *In re* Southwest Sunsites, 105 F.T.C. 7 (1985), *aff'd*, 785 F.2d 1431 (9th Cir. 1986); *In re* Thompson Medical Co., 104 F.T.C. 648 (1984); *In re* International Harvester, 104 F.T.C. 949 (1984).

84. *In re* Thompson Medical Co., Inc., 104 F.T.C. 648, 788 n.4 (1984) (opinion of the Commission); *In re* International Harvester Co., 104 F.T.C. 949, 1077-88 (1984) (statement of Commissioner Bailey, concurring in part and dissenting in part). *See also* Bailey & Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U.L. REV. 849 (1984).

85. 105 F.T.C. 7 (1985), *aff'd*, 785 F.2d 1431 (9th Cir. 1986).

86. 785 F.2d at 1436.

obvious impact on federal deception enforcement policy. The question that now must be addressed is whether this revised federal deception standard will indirectly affect comparable state enforcement programs implemented by state attorneys general and state consumer protection agencies.[87] Presently, twenty-six states either judicially or statutorily mandate that state courts look to the interpretations of the Federal Trade Commission and the federal courts when determining what constitutes a deceptive trade act or practice under the state's Little FTC Acts.[88] The manner in which this question is resolved by various state courts portends serious consequences for resident consumers. Although former Chairman Miller is on record as recommending that states follow the new federal deception standard,[89] it is necessary to consider seriously the effect of the new standard on the underlying, consumer-oriented policy that served as the impetus for the enactment of state consumer protection statutes.

A. Consideration

The Illinois Consumer Fraud and Deceptive Business Practices Act (IDPA)[90] includes a deference provision providing that "consideration" will be given to interpretations of the federal standard in deciding whether a trade practice violates the state statute.[91] One of the first challenges mounted against the IDPA focused on the argument that the description "unfair or deceptive acts or practices" was overbroad and vague. Although a lower court held the statute unconstitutional on this basis, the Illinois Supreme Court quickly dis-

87. In 1982, Mr. John J. Easton, Jr., then Attorney General for the State of Vermont, provided congressional testimony critical of Chairman Miller's proposed deception standard and the impact that it would have on state deception enforcement policy. *See FTC's Deception Authority Hearings, supra* note 19, at 84-85, (statement of Mr. John J. Easton, Jr.)

88. *See supra* notes 24-31 and accompanying text.

89. *FTC's Deception Authority Hearings, supra* note 19, at 21-22. Former Chairman Miller stated:

> While I commend to the states the virtues of statutorily defining the term "deceptive acts or practices," I recognize that some may disagree with my proposal as a prescription for state regulation. The beauty of our federal system is that is allows room for experimentation and variety, to suit the viewpoints of different groups. In this regard, I am convinced that the statutory definition of deception would have no significant impact upon those states that wish to adhere to prior constructions.

Id.

90. ILL. ANN. STAT. ch. 121 ½, para. 262 (Smith-Hurd Supp. 1987).

91. The IDPA deference provision provides: "In construing this section *consideration* shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act." ILL. ANN. STAT. ch. 121 ½, para. 262 (Smith-Hurd 1987) (footnote omitted) (emphasis added).

pensed with that conclusion.[92] In *Scott v. Association for Childbirth at Home, International*,[93] the court stated that the intent of the Illinois legislature was to insure that the statute be applied broadly by state courts.[94] The court described how the FTC and federal courts defined words and phrases contained within the federal statute in a similar manner, and emphasized that words like deception and misrepresentation can easily be defined according to how they are understood by the general public.[95] Finally, the court underscored the importance of the IDPA deference provision by stating that the federal deceptive trade practice standard "has a venerable history of interpretation and definition by the federal courts."[96] Those courts appropriately defined phrases that are inherently insusceptible of precise definition, and the current state of federal trade law is "well settled."[97]

The *Scott* case, decided two years before *Cliffdale*, demonstrates the close connection between federal law and the regulation of deceptive trade practices in Illinois. Prior to *Cliffdale*, Illinois state courts strove to adopt all aspects of the federal deception standard. For example, courts held that it is not necessary to establish that consumers were actually deceived or confused by a questioned trade practice.[98] Illinois courts also took the position that good faith

92. Scott v. Association for Childbirth at Home, Int'l, 88 Ill. 2d 279, 290-91, 430 N.E.2d 1012, 1018 (1982).

93. 88 Ill. 2d 279, 430 N.E.2d 1012 (1982).

94. *Id.* at 284, 430 N.E.2d at 1015. *See also* Hurlbert v. Cottier, 56 Ill. App. 3d 893, 895, 372 N.E.2d 734, 736 (1978).

95. 88 Ill. 2d at 289, 430 N.E.2d at 1017.

96. *Id.* (citing FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972), and Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976)). *See also* Hurlbert v. Cottier, 56 Ill. App. 3d 893, 895, 372 N.E.2d 734, 736 (1978) (IDPA deference provision could be extended beyond determining the nature of prohibited acts to cover cases in which a statutory deficiency could be cured by consulting federal law and court decisions).

97. 88 Ill. 2d at 289, 430 N.E.2d at 1017. *See* People *ex rel.* Fahner v. Testa, 112 Ill. App. 3d 834, 445 N.E.2d 1249 (1983) (IDPA terms must be defined on a case-by-case basis because it would be futile to try to anticipate all the questionable trade practices that a fertile mind might devise).

98. Glazewski v. AllState Ins. Co., 126 Ill. App. 3d 401, 407, 466 N.E.2d 1151, 1157 (1984); Williams v. Bruno Appliance & Furniture Mart, Inc., 62 Ill. App. 3d 219, 220, 379 N.E.2d 52, 53-54 (1978).

One lower appellate court ruling is contrary to this general policy. In Robacki v. Allstate Ins. Co., 127 Ill. App. 3d 294, 468 N.E.2d 1251 (1984), the plaintiff alleged that Allstate fraudulently concealed information regarding coverages available under a new policy. The court held for the defendant insurance company, stating that:

> This record shows that there was no actual confusion or misunderstanding on plaintiff's part. Also, there was no likelihood of confusion by the plaintiff and in fact there was no deception or misunderstanding. There was no violation of the Consumer Fraud and Deceptive Business Practices Act . . ., nor of the Uniform Deceptive Trade Practices Act . . . . no genuine issue of material fact is raised so the defendant was entitled to judgment as a matter of law.

and lack of intent would not constitute a proper defense under the IDPA.[99] More importantly, these courts took a pro-consumer position regarding overall application of the state consumer protection act.[100] In addition to holding that the deception standard was intended to protect the "ignorant, the unthinking, and the credulous" consumer,[101] Illinois courts held that the statute includes deceptions perpetrated by real estate brokers upon prospective buyers.[102] In a number of cases, the courts held that a cause of action under the IDPA can be substantiated despite failure to prove all the elements of common law fraud.[103]

In addition to case law expressly adopting the traditional deception standard,[104] at least two Illinois courts addressed the significance of the IDPA's federal deference provision post-*Cliffdale*. Most importantly, in *City of Aurora v. Green*,[105] the court recognized the capacity to deceive test as the appropriate deception standard under the IDPA.[106] In the 1985 case of *People ex rel. Hartigan v. Stianos*,[107] the Illinois attorney general sought a preliminary injunction to prevent retailers from charging customers excessive sales tax as

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Id. at 299, 468 N.E.2d at 1256 (citations omitted).

99. Warren v. LeMay, 142 Ill. App. 3d 550, 491 N.E.2d 464, *appeal after remand*, 494 N.E.2d 206 (1986); People *ex rel.* Fahner v. Walsh, 122 Ill. App. 3d 481, 461 N.E.2d 78 (1984); People *ex rel.* Hartigan v. Maclean Hunter Publishing Corp., 119 Ill. App. 3d 1049, 1055, 457 N.E.2d 480, 486 (1983); Grimes v. Adlesparger, 67 Ill. App. 3d 582, 584, 384 N.E.2d 537, 539 (1978); American Buyer's Club v. Hays, 46 Ill. App. 3d 270, 271, 361 N.E.2d 1383, 1384 (1977); American Buyer's Club v. Honecker, 46 Ill. App. 3d 252, 256, 361 N.E.2d 1370, 1374 (1977).

100. Illinois courts have recognized that the consumer fraud act is intended to provide broader consumer protection than would be provided by an action in common law fraud and that the act should be liberally construed in order to achieve this purpose. *See generally* Kellerman v. Mar-Rue Realty & Builders, Inc., 132 Ill. App. 3d 300, 476 N.E.2d 1259 (1985); People *ex rel.* Fahner v. American Buyers Club, Inc., 115 Ill. App. 3d 759, 450 N.E.2d 904 (1983); Hurlbert v. Cottier, 56 Ill. App. 3d 893, 372 N.E.2d 734 (1978).

101. Williams v. Bruno Applicance & Furniture Mart, 62 Ill. App. 3d 219, 221, 379 N.E.2d 52, 54 (1978).

102. Beard v. Gress, 90 Ill. App. 3d 591, 413 N.E.2d 486 (1980).

103. Graphic Sales, Inc. v. Sperry Univac Div., 824 F.2d 576 (7th Cir. 1987); Buechin v. Ogden Chrysler Plymouth Inc., 159 Ill. App. 3d 237, 244, 511 N.E.2d 1330, 1337 (1987); Buzzard v. Bolger, 117 Ill. App. 3d 887, 890, 453 N.E.2d 1129, 1132 (1983); Duhl v. Nash Realty, Inc., 102 Ill. App. 3d 483, 494, 429 N.E.2d 1267, 1277 (1981).

104. People *ex rel.* Hartigan v. MacLean Hunter Publishing Corp., 119 Ill. App. 3d 1049, 1055, 457 N.E.2d 480, 486 (1983); Harwood v. Piser Memorial Chapels, 102 Ill. App. 3d 514, 516, 430 N.E.2d 553, 555 (1981); Williams v. Bruno Appliance & Furniture Mart, 62 Ill. App. 3d 219, 221, 379 N.E.2d 52, 54 (1978). The Illinois statute also provides a listing of acts that constitute deceptive trade practices. ILL. ANN. STAT. ch. 121 ½, para. 312 (Smith-Hurd Supp. 1987).

105. 126 Ill. App. 3d 684, 467 N.E.2d 610 (1984).

106. *Id.* at 688, 467 N.E.2d at 613 ("The focus of the reviewing court's inquiry under the [Illinois Consumer Protection Act] is the deceptive capacity of the statements at issue.").

107. 131 Ill. App. 3d 575, 475 N.E.2d 1024 (1985).

prescribed by state law.[108] The court held that this practice was both unfair and deceptive as contemplated by the IDPA, and that courts were empowered under the federal deference provision to decide what constituted an unfair or deceptive practice on a case by case basis.[109] The court also noted that "in determining whether a practice is unlawful or deceptive, consideration is to be given to interpretations of the FTC and the federal courts under the FTCA."[110] Although the court only applied the criteria for what constitutes an unfair act under federal law, it is apparent that Illinois state courts continue to recognize the obligation to look to the FTC and federal court interpretations when faced with a deceptive trade practice issue.[111] Therefore, it is reasonable to assume that in the future Illinois courts will have to balance these case precedents against the question of whether the *Cliffdale* deception standard should alter the manner in which deceptive trade practice cases are handled under the IDPA. Given the number of pro-consumer holdings, this possibility appears to be unlikely.

B. Due Consideration and Great Weight

The consumer protection statutes of Alabama,[112] Alaska,[113] Florida,[114] Idaho,[115] Maryland,[116] Montana,[117] Ohio,[118] and Rhode

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108. *See id.* at 576, 475 N.E.2d at 1025.

109. *See id.* at 579, 475 N.E.2d at 1028. In People v. All American Aluminum & Construction, 171 Ill. App. 3d 27, 524 N.E.2d 1067 (1988), the court noted the judicial obligation to consider Federal Trade Commission decisions when evaluating unfair and deceptive trade practices. *Id.* at 34, 524 N.E.2d at 1071. The *All American Aluminum* court, however, incorrectly stated that the federal standard for evaluating unfair and deceptive trade practices was the same; the court applied the federal unfairness standard to the questioned trade practice. *Id.*

110. People *ex rel.* Hartigan v. Stianos, 131 Ill. App. 3d 575, 579, 475 N.E.2d 1024, 1028-29 (1985).

111. *See id.* at 579, 475 N.E.2d at 1028-29.

112. "It is the intent of the legislature that in construing [the Alabama Deceptive Trade Practices Act], *due consideration and great weight* shall be given where applicable to interpretations of the federal trade commission and the federal courts relating to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), ..." ALA. CODE § 8-19-6 (1984 & Supp. 1987) (emphasis added).

113. "In interpreting [the Alaska Unfair Trade Practices and Consumer Protection Act] *due consideration and great weight* should be given the interpretations of 15 U.S.C. 45(a)(1) [§ 5(a)(1) of the Federal Trade Commission Act]." ALASKA STAT. § 45.50.545 (1986 & Supp. 1987) (emphasis added).

114. "It is the intent of the legislature that, in construing [the term 'deceptive practice'] *due consideration and great weight* shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), *as amended and in effect on April 1, 1983.* FLA. STAT. ANN. § 501.204(2) (West 1972 & Supp. 1987) (emphasis added).

115. "It is the intent of the legislature that in construing this act *due consideration and great weight* shall be given to the interpretation of the federal trade commission and the federal courts relating to section 5(a)(1) of the federal trade commission act . . . ." IDAHO CODE

Island[119] provide that "due consideration and great weight" be given to Federal Trade Commission decisions and federal court interpretations of the Federal Trade Commission Act. Five of these states have case law addressing the issue of how the federal deception policy should affect state court decisions.[120] In addition to providing that "due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts,"[121] the Florida Deceptive and Unfair Trade Practices Act (FDUTPA)[122] provides that the Department of Legal Affairs shall have the authority to promulgate substantive rules to effectuate the purpose of the statute.[123] Interestingly, the Act provides that these rules "shall be consistent with the rules, regulations, and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of Section 5(a)(1) of the Federal Trade Commission Act . . . ."[124] In *Department of Legal Affairs v. Rogers*,[125] the plaintiff Rogers challenged this rulemaking authority as an unconstitutional delegation of state legislative authority.[126] The Department of Legal Affairs alleged that plaintiff's word puzzle game constituted an unlawful wager or lottery in direct violation of an administrative rule promulgated pursuant to the Florida consumer protection statute.[127] The court noted the presumption of constitutionality generally accorded such a statute and concluded "that the act does not constitute

§ 48-604 (1977 & Supp. 1987) (emphasis added).

116. "It is the intent of the General Assembly that in construing the term 'Unfair or Deceptive Trade Practices', *due consideration and weight* be given to the interpretations of section 5(a)(1) of the Federal Trade Commission Act by the Federal Trade Commission and the federal courts." MD. COM. LAW CODE ANN. § 13-105 (1983 & Supp. 1987) (emphasis added).

117. "It is the intent of the legislature that in construing [the term 'deceptive practice'] *due consideration and weight* shall be given to the interpretations of the federal trade commission and the federal courts relating to section 5(a)(1) of the Federal Trade Commission Act . . . ." MONT. CODE ANN. § 30-14-104 (1987) (emphasis added).

118. "In construing . . . this section, the court shall give *due consideration and great weight* to Federal Trade Commission orders, trade regulation rules and guides, and the federal court's interpretations of section 45(a)(1) of the 'Federal Trade Commission Act' . . . ." OHIO REV. CODE ANN. § 1345.02(c) (Anderson 1979 & Supp. 1986) (emphasis added).

119. "It is the intent of the legislature that in construing . . . this chapter *due consideration and great weight* shall be given to the interpretations of the federal trade commission and the federal courts relating to section 5(a) of the federal trade commission Act (15 U.S.C. 45(a)(1)), ..." R.I. GEN. LAWS § 6-13.1-3 (1985 & Supp. 1989) (emphasis added).

120. These states include Alaska, Florida, Idaho, Maryland, and Ohio. *See infra* notes 121-71 and accompanying text.

121. FLA. STAT. ANN. § 501.204 (West 1988).

122. FLA. STAT. ANN. § 501.201-.213 (West 1988).

123. *Id.* § 501.205(1).

124. *Id.* § 501.205(2).

125. 329 So. 2d 257 (Fla. 1976).

126. *Id.* at 260.

127. *Id.* at 258-59.

an unlawful delegation of legislative authority but rather . . . that adequate standards have been announced in the Act to guide the administrative agency and the exercise of the delegated powers consistent with constitutional dictates."[128] The court similarly dismissed a related argument that the statute's federal deference provision was vague, indefinite, and, therefore, unconstitutional.[129]

To bolster its holding that the delegation of legislative authority permitted by the Act was constitutional, the court addressed the issue of whether the statute "intended to incorporate future (subsequent to the effective date of the statute) decisions of the Federal Trade Commission and federal court decisions."[130] The court answered this question by concluding that the Florida legislature intended to incorporate only those federal court decisions and Federal Trade Commission opinions issued prior to the enactment of the FDUTPA.[131] Based on the *Rogers* holding, it is clear that Florida state courts will give due consideration and great weight to federal interpretations that were in effect on April 1, 1983, the date that the FDUTPA was implemented. Unless this statute is amended, the traditional tendency or capacity to deceive standard will continue to be the governing standard in Florida.[132]

The Alaska Unfair Trade Practices and Consumer Protection Act (ACPA)[133] provides that "unfair or deceptive acts or practices in the conduct of trade or commerce" are unlawful.[134] The ACPA defines "unfair or deceptive acts or practices" as including but not limited to twenty-five specific practices listed in the statute.[135] In addition to this advisory listing of deceptive trade practices, the Alaska Act also mandates that "due consideration and great weight" be accorded to FTC and federal court interpretations of the FTCA.[136] In a sweeping 1980 decision, *State v. O'Neill Investigations, Inc.*,[137] the

128. Department of Legal Affairs v. Rogers, 329 So. 2d at 265. The court also recognized the legislative intent that the FDUTPA state a broad public policy in order "to avoid as much as possible the creation of loopholes by unscrupulous businesses whereby they could circumvent the laws." *Id.* at 262.

129. *Id.* at 263.

130. *Id.* at 267.

131. The court stated: "To preserve the constitutional validity of the Act, we would have to say that the legislative enactment intended only decisions made prior to its enactment." *Id.*

132. A subsequent decision held that if the Florida legislature wants to adopt contempory federal standards, the FDUTPA may be updated yearly. *See* State v. Rodriguez, 365 So. 2d 157, 160 (Fla. 1978).

133. ALASKA STAT. §§ 45.50.471-.561 (1986 & Supp. 1989).

134. *Id.* § 45.50.471(a).

135. *Id.* § 45.50.471(b).

136. *Id.* § 45.50.545.

137. 609 P.2d 520 (Alaska 1980).

Supreme Court of Alaska embraced all aspects of the traditional federal deception standard. The court held that actual injury and intent to deceive need not be established in order to present a prima facie case under the deceptive practice provision.[138]

The defendant in *O'Neill* argued that excessive weight and undue consideration had been accorded federal interpretations of the FTCA and that these interpretations were not analogous to the instant case because the federal act does not cover third party debt collection.[139] The Alaska Superior Court accepted these arguments, finding that the ACPA was unconstitutionally vague as applied to particular trade practices.[140] On appeal, the Alaska Supreme Court overturned this holding and in the process firmly entrenched the traditional deception standard as part of Alaska state law:

> [W]e find that the words of [the Alaska Act] have a "well defined" meaning in the area of trade regulation and are therefore not vague. Since the Alaska Act directs that this section be interpreted by giving "great weight" and "due consideration" to the FTC and federal court interpretations of the analogous federal statute, the words have a fixed meaning which has survived challenges for vagueness. It is axiomatic that words will be infused with the meaning of prior judicial construction. *The relevant prior judicial construction here is that which has emerged from agency and judicial interpretation of the identical words of the federal statute.*[141]

The court concluded its analysis in *O'Neill* by stating that "an act or practice is deceptive or unfair if it has the capacity or tendency to deceive."[142] Based upon this strong endorsement of the traditional deception standard by the Alaska Supreme Court in 1980, the stage is set in Alaska for a review of this policy should an appropriate deception case arise. Such strict judicial adherence to the federal deference provision indicates that Alaska courts are likely to be in-

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138. *Id.* at 534-35. *See also* State v. First Nat'l Bank, 660 P.2d 406 (Alaska 1982) (liberal construction).

139. State v. O'Neill Investigations, Inc., 609 P.2d at 529 (Alaska 1980).

140. *Id.* at 530.

141. *Id.* at 532 (emphasis added). The court continued:

> [t]he failure of the state to adopt regulations fleshing out the contours of the Alaska Act is . . . saved by the Federal Trade Commission's interpretations of identical statutory language. This infusion of FTC law and regulations satisfies the fundamental due process insistence "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."

Id. at 533 (footnote omitted) (citing Grayned v. City of Rockford, 408 U.S. 104 (1972)).

142. *Id.* at 534.

fluenced by any significant change in the federal deception standard.

The Ohio Consumer Sales Practices Act (OCSPA)[143] is similar to the Alaska statute in that it prohibits unfair or deceptive acts or practices and subsequently lists a number of practices that are deemed to be deceptive.[144] Additional language in the Act indicates that this listing is not intended to limit the scope of the general prohibition against deceptive trade practices.[145] Ohio courts endorsed the legislative intent that the Act be given broad applicability and a liberal construction.[146]

In *Thomas v. Sun Furniture & Appliance Co.*,[147] a pre-*Cliffdale* case, the Ohio Court of Appeals addressed the question of whether the use of simulated official court documents in the debt collection process constituted a deceptive trade practice.[148] The court reviewed the history of the Uniform Consumer Sales Practices Act, after which the Ohio statute had been modeled, to decide whether a prima facie case required proof of an intent to deceive. In keeping with the federal standard, the court concluded that "to require proof of intent would effectively emasculate the Act and contradict its fundamental purpose."[149]

More importantly, the *Thomas* case openly endorsed the traditional deception standard. Citing the Court of Appeals for the Third Circuit's opinion in *Beneficial Corp. v. FTC*,[150] the court ruled that Sun Furniture's collection practice was a violation of the OCSPA because "the likelihood of deception or the *propensity to deceive* is the criterion by which the act or practice is judged."[151]

This deception standard was followed subsequently in *Celebrezze v. United Research, Inc.*[152] The court decided *Celebrezze* on June 6, 1984, just three months after *Cliffdale*. The *Celebrezze* court specifically noted the statutory deference provision in the Ohio Act and utilized FTC and federal court case precedent in deciding that

143. OHIO REV. CODE ANN. §§ 1345.01-.99 (Anderson 1979 & Supp. 1986).

144. *Id.* § 1345.02(A), (B).

145. *Id.*; § 1345.02(B) provides a listing of ten specific trade practices deemed to be deceptive under the Ohio statute.

146. Liggins v. May Co., 53 Ohio Misc. 21, 22, 373 N.E.2d 404, 405 (1977). *See also* Thomas v. Sun Furniture & Appliance Co., 61 Ohio App. 2d 78, 80, 399 N.E.2d 567, 569 (1978) (intent to deceive not required to establish a violation of the Ohio Act.); Weaver v. J.C. Penney Inc., 53 Ohio App. 2d 165, 372 N.E.2d 633 (1977) ("It is not necessary that a sale actually take place in order for a supplier to be held liable for committing a deceptive act.").

147. 61 Ohio App. 2d 78, 399 N.E.2d 567 (1978).

148. *See id.* at 82-83, 399 N.E.2d at 570.

149. *See id.* at 81, 399 N.E.2d at 570.

150. 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

151. *Thomas*, 61 Ohio App. 2d at 81, 399 N.E.2d at 570.

152. 19 Ohio App. 3d 49, 482 N.E.2d 1260 (1984).

the practice of filing debt collection suits in judicial districts other than the district where the consumer resides constitutes a deceptive trade practice.[153] Since the *Cliffdale* decision was not mentioned in *Celebrezze*, Ohio continues to follow the traditional federal deception standard.

The Maryland Consumer Protection Act (MCPA)[154] includes a deference provision providing for due consideration of federal interpretations.[155] The Act also provides a non-exclusive list of unfair and deceptive trade practices including any: "(1) False, disparaging, or misleading oral or written statement, visual description, or other representation of any kind *which has the capacity, tendency, or effect of deceiving or misleading consumers*; . . . (3) Failure to state a material fact if the failure *deceives or tends to deceive* . . . ."[156] The importance of this section is two-fold. First, the Maryland Attorney General issued an opinion interpreting section 13-301 as a nonexclusive listing of the type of trade practices that the legislature intended to prohibit.[157] Based on legislative history, the Attorney General concluded that the Division of Consumer Protection has the authority to define unfair and deceptive trade practices in addition to those acts or practices expressly proscribed by this section.[158] Second, this section of the MCPA codified the traditional tendency or capacity to deceive standard. As a result, when this section is read in conjunction with the broad mandate of the federal deference provision, the Maryland statute implicitly rejects any application of the *Cliffdale* reasonable consumer standard.

There is only one reported case in which Maryland courts applied the section 13-301 deception standard. In *Golt v. Phillips*,[159] a 1986 post-*Cliffdale* case, tenant Golt sued landlord Phillips for violation of the MCPA based on the advertising and renting of an unlicensed apartment dwelling.[160] Golt argued that the failure to disclose that the dwelling was unlicensed constituted the omission of a material fact for which he was entitled to restitutionary damages under the statute.[161] The court of appeals did not mention the *Cliffdale* case; instead, the court relied upon several well-known federal court

153. *Celebrezze*, 19 Ohio App. 3d at 51, 482 N.E.2d at 1262.
154. MD. COM. LAW CODE ANN. §§ 101-501 (1983 & Supp. 1987).
155. *Id.* § 105.
156. *Id.* § 13-301 (emphasis added).
157. 62 Op. Att'y Gen. 535 (1977).
158. *Id.* at 539.
159. 308 Md. 1, 517 A.2d 328 (1986).
160. *Id.* at 5-6, 517 A.2d at 330.
161. *See id.* at 4, 517 A.2d at 331.

decisions to support its conclusion that a deceptive trade practice had been committed. The court stated:

> [The landlord] . . . violated Section 13-301(3) of the CPA, which states that the failure to disclose a material fact, *which deceives or tends to deceive*, is an unfair or deceptive trade practice. The lack of proper licensing is a material fact that Phillips Brothers failed to state. In addition, failure to disclose this fact deceived Golt or at least had the *tendency to deceive consumers. An omission is considered material if any significant number of unsophisticated consumers would attach importance to the information in determining a choice of action.*[162]

With the adoption of the substantial numbers test[163] of the traditional federal deception standard and the reference to "unsophisticated consumers,"[164] the Maryland courts reinforced the statutory language of the CPA with judicial acknowledgement of and deference to the traditional tendency to deceive deception standard. Consequently, it is unlikely that Maryland will adopt the *Cliffdale* standard.

Deception litigation under the Idaho Consumer Protection Act (ICPA) has been rather limited. Idaho courts acknowledged the ICPA's federal deference provision[165] and are also guided to some extent by the statute's listing of unfair methods and practices.[166] In *State ex rel. Kidwell v. Master Distributors, Inc.*,[167] a 1980 pre-*Cliffdale* case, the Idaho Supreme Court adopted the three key components of the federal deception standard: (1) actual deception is not required in order to bring a deception action;[168] (2) the absence of

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162. *See id.* at 5, 517 A.2d at 332 (citing Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676, 679-80 (2d Cir. 1944) and Gulf Oil Corp. v. FTC, 150 F.2d 106, 109 (5th Cir. 1945)) (emphasis added).

163. *See supra* notes 59-63 and accompanying text.

164. The reference to "unsophisticated consumers" is an indication that the Maryland Consumer Protection Act is to be applied broadly. This pro-consumer orientation can be traced to the early development of the traditional "tendency or capacity" to deceive federal deception standard. In Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1942), the court held that the legal standard for deception was constructed in such a way so as to protect even "the ignorant, the unthinking and the credulous." *Id.* at 167.

165. State *ex rel.* Kidwell v. Master Distribs., Inc., 101 Idaho 447, 615 P.2d 116 (1980); Idaho First Nat'l Bank v. Wells, 100 Idaho 256, 596 P.2d 429 (1977).

166. IDAHO CODE § 48-603 (1979).

167. 101 Idaho 447, 615 P.2d 116 (1980).

168. *Id.* at 453, 615 P.2d at 122. However, in Yellowpine Water User's Ass'n v. Imel, 105 Idaho 349, 670 P.2d 54 (1983), the Supreme Court of Idaho stated that under IDAHO CODE §§ 48-603 and 48-608(1), an individual bringing an action under the ICPA must suffer some "ascertainable loss of money or property . . . as a result of the use or employment by another person of a method, act or practice" which proves to be misleading, deceptive, or false or which is otherwise prohibited by the Act. *See id.* at 351-52, 670 P.2d at 56-57.

intent to deceive is not a proper defense to a deception claim;[169] and, (3) most importantly, an act or practice is deceptive if it possesses a tendency or capacity to deceive consumers.[170] The court pointed out, however, that current federal case law, "although not binding is persuasive in application of the Idaho Consumer Protection Act."[171] Since no post-*Cliffdale* deception cases have been decided under the ICPA, the *Kidwell* case indicates that Idaho courts consider federal precedent to be advisory and nonbinding. Consequently, since the tendency to deceive deception standard is firmly established in Idaho, it is doubtful that *Cliffdale* will have any direct impact.

Finally, the Alabama Deceptive Trade Practices Act (ADTPA),[172] the Montana Unfair Trade Practices and Consumer Protection Act of 1973 (MUTPA),[173] and the Rhode Island Unfair Trade Practice and Consumer Protection Act (RICPA)[174] all provide that "due consideration and great weight" be given to interpretations rendered by the Federal Trade Commission and the federal courts in deception cases.[175] The Alabama and Rhode Island statutes provide a nonexclusive listing of unlawful, deceptive trade practices.[176] Since there has been no litigation under these three statutes regarding the deception standard to be applied in state cases, it is uncertain whether the *Cliffdale* case will have any impact on deception enforcement policy in these states.

C. *Guidance*

1. Mandatory Guidance.—The Little FTC Acts of Connecticut,[177] Maine,[178] Massachusetts,[179] South Carolina,[180] Vermont,[181]

169. State *ex rel.* Kidwell v. Master Distribs., Inc., 101 Idaho 447, 453-54, 670 P.2d 116, 122-23 (1980).

170. *Id.* at 454, 670 P.2d at 123.

171. *See id.* at 453, 670 P.2d at 122.

172. ALA. CODE §§ 8-19-1 to 8-19-15 (1984).

173. MONT. CODE ANN. §§ 30-14-101 to 30-14-224 (1989).

174. R.I. GEN. LAWS §§ 6-13.1-1 to 6-13.1-19 (1985 & Supp. 1989).

175. *See supra* notes 112, 117, 119.

176. ALA. CODE § 8-19-5 (1984); R.I. GEN. LAWS § 6-13.1-7(5) (1985 & Supp. 1989).

177. "It is the intent of the legislature that in construing . . . this section, the Commissioner and the courts of this state *shall be guided* by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act . . . ." CONN. GEN. STAT. ANN. § 42-110(b) (West 1987) (emphasis added).

178. "It is the intent of the legislature that in construing this section, the courts *will be guided* by the interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act . . . ." ME. REV. STAT. ANN. tit. 5, § 207(1) (1979 & Supp. 1987) (emphasis added).

179. "It is the intent of the legislature that in construing [this Act] courts *will be guided* by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a) of the Federal Trade Commission Act . . . ." MASS. GEN. LAWS ANN. ch. 93A: 2(b)

Washington,[182] and West Virginia[183] provide that state courts be "guided" by the interpretations of the Federal Trade Commission and the federal courts. All of these states have case law addressing the state deception standard based on mandatory guidance deference provisions.

The West Virginia Consumer Credit and Protection Act not only provides a guidance deference provision, but also declares that the legislative intent is for the statute to complement the existing body of federal law that governs unfair and deceptive trade practices.[184] The West Virginia Act also provides a nonexclusive listing of acts or practices deemed to be unfair or deceptive per se.[185] To promote the underlying legislative intent of the Act, the West Virginia statute also permits the state attorney general to promulgate rules and regulations that interpret and define the statute's provisions.[186] These rules and regulations must conform "as nearly as practicable" with comparable regulations and decisions of the FTC and the federal courts.[187]

At least one West Virginia court acknowledged the mandatory guidance provision of the Little FTC Act. In *McFoy v. Amerigas,*

(West 1988) (emphasis added).

180. "It is the intent of the legislature that in construing . . . this section the courts *will be guided* by the interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) . . . ." S.C. CODE ANN. § 39-5-20(b) (Law. Co-op 1976 & Supp. 1987) (emphasis added).

181. "It is the intent of the legislature that in construing [this Act] courts of this state *will be guided* by the construction of similar terms contained in section 5(a)(1) of the Federal Trade Commission Act as from time to time amended by the Federal Trade Commission and the courts of the United States." VT. STAT. ANN. tit. 9, § 2453(b) (1984 & Supp. 1987). (emphasis added).

182. The Washington statute provides as follows:

> The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts *be guided* by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters . . . .

WASH. REV. CODE ANN. § 19.86.920 (1989) (emphasis added).

183. The West Virginia statute provides as follows:

> The legislature hereby declares that the purpose of this article is to complement the body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that in construing this article, the courts *be guided* by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters.

W. VA. CODE § 46A-6-101 (1986 & Supp. 1987) (emphasis added).

184. *See supra* note 183.

185. W. VA. CODE § 46A-6-102(F)(1-14) (1986 & Supp. 1987).

186. *Id.* § 46A-6-103.

187. *Id.*

Inc.,[188] several customers initiated a class action against a seller of liquid propane gas, claiming that the levy of minimum usage charges constituted a deceptive trade practice.[189] The court paid particular attention to a provision of the West Virginia statute that indicates that by passing the Little FTC Act, the legislature did not intend to prohibit trade practices or acts that are reasonable relative to the "development and preservation of business or which are not injurious to the public interest."[190] Applying this language to the facts in *McFoy*, the court concluded that there was nothing inherently deceptive about imposing the levies and, therefore, the trial court's finding of deception liability as a matter of law was incorrect.[191] This ruling emphasized that the section of the West Virginia statute prohibiting unfair or deceptive acts or practices must be read in *pari materia* with the Act's public interest provision.[192] The *McFoy* decision indicates that West Virginia courts recognized the mandatory guidance deference provision. Questions remain, however, as to the extent of influence that the public interest provision will have on future deception cases. At this point, the question of whether West Virginia will adopt the *Cliffdale* standard remains open.

Maine is one of only a few states with case law that differentiates between the standard of proof to be used in deception cases brought by private consumers and those brought by the attorney general. Section 213 of the Maine Unfair Trade Practices Act (MUTPA) permits a consumer who has purchased a good or service primarily for personal or household use to bring a private action as long as the consumer has suffered a loss of money or property.[193]

The only case that has dealt with the deception standard of proof involved a private consumer who brought an action against a real estate broker charging that residential acreage had been misrepresented in a sales transaction.[194] In *Bartner v. Carter*,[195] the plaintiff consumer filed suit under the private remedies section of the Maine Unfair Trade Practices Act. The Supreme Judicial Court of

188. 295 S.E.2d 16 (W. Va. 1982).

189. *Id.* at 18.

190. *Id.* at 20. The relevant section of the West Virginia Consumer Credit and Protection Act provides: "It is, however, the further intent of the legislature that this article shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest . . . ." W. VA. CODE § 46A-6-101(2) (1986 & Supp. 1987).

191. McFoy v. Amerigas, Inc., 295 S.E.2d at 19.

192. *Id.* at 17.

193. ME. REV. STAT. ANN. tit. 5, § 213 (1989).

194. Bartner v. Carter, 405 A.2d 194 (Me. 1979).

195. 405 A.2d 194 (Me. 1979).

Maine acknowledged the mandatory guidance provision of the MUTPA and noted that the court's obligation to defer to federal interpretations differed from cases brought by the state attorney general.[196] The Court stated that in actions brought by the attorney general, defenses such as good faith or a lack of intent would not be permitted given the overwhelming federal precedent.[197] Since this case involved a private consumer, however, the court was reluctant to impose the traditional federal deception standard based on the absence of a private right of action in the FTCA. The Supreme Judicial Court reasoned that because the federal statute does not have a private remedy, Maine courts are not required to render an "all inclusive application" of various interpretations of the FTCA.[198]

Under section 213 of the MUTPA, a private consumer must establish that by purchasing or leasing she suffered a "loss of money or property" as a result of the prescribed trade practice or act.[199] The interpretation given this particular provision by the Maine court recognized that resident consumers had been given an extremely potent weapon. That weapon was capable of being used improperly for harrassment, especially if the federal courts' rigorous application of FTCA section 5 was available via the deference provision.[200] According to the court, the Maine legislature intended that the loss requirement of section 213 preclude a private consumer from bringing an

196. *Id.* at 201.

197. *Id.* at 200. In actions filed by the state attorney general the Maine Supreme Judicial Court has adopted the federal decision that an intent to deceive is not a proper defense under the MUTPA. *See* State v. Bob Chambers Ford, Inc., 522 A.2d 362, 365 (Me. 1987).

198. Bartner v. Carter, 405 A.2d 194, 200 (Me. 1979). The Court also carefully analyzed the remedies available under the MUTPA as compared with the federal act:

> The Federal Trade Commission Act is designed primarily to protect the public, not to punish wrongdoers or to afford direct remedies to private citizens. Its primary purpose is to afford a preventive remedy, not a compensatory one, and the Commission does not have to demonstrate the violation of some private right as a basis for its remedial action. The Commission and the federal courts are mainly concerned, in applying Section 5(a)(1), with defendants who are engaged in continuing or repeated acts or practices deemed by the Commission to be unlawful under that section. Because the primary purpose is to stop unfair or deceptive practices, the chief remedy of the Commission is the cease-and-desist order enforceable by civil penalties in the federal courts. Section 213 of the Maine statute, on the other hand, gives the consumer-plaintiff the remedies of 'restitution' and 'such other equitable relief, including an injunction, as the Court may deem to be necessary and proper.' Since there is no analogue in the federal statute for the remedy by a comsumer's action and since the preventive purpose of the Commission's action under the federal act is different from the restitutionary purpose of individual private relief under the Maine statute, *the federal decisions afford uncertain guidance in the interpretation of the main private remedial revisions.*

Id. at 201 (*emphasis added*).

199. ME. REV. STAT. ANN. tit. 5, § 213 (1989).

200. Bartner v. Carter, 405 A.2d 194, 201-02 (Me. 1979).

action when she was unaffected by the product or service misrepresentation.[201] The court concluded that an individual consumer seeking redress under section 213 could not prevail by simply establishing that the representations had a capacity or tendency to deceive.[202]

Even though the Maine court reached this conclusion, it is still important to assess the prospect of whether the traditional federal deception standard might be followed in cases filed by the state attorney general. The *Bartner* court stated that Maine courts might apply the tendency to deceive standard in such cases.[203] Since *Bartner* was a pre-*Cliffdale* case, and there are no other reported deception cases in Maine, it is difficult to assess the likelihood that the reasonable consumer test will be adopted. Given the strong statements made by the court in dicta regarding the then-current federal deception enforcement policy,[204] the Maine court is more likely to take the mandatory guidance obligation literally and apply the *Cliffdale* standard.

The deference provision of the South Carolina Unfair Trade Practices Act (SCUTPA)[205] provides that state courts "will be guided" by federal interpretations of the FTCA.[206] State courts have acknowledged this legislative mandate in both deceptive trade practice and unfair competition cases.[207] The South Carolina Appellate Court first recognized the traditional federal deception standard in a February 1984 pre-Cliffdale case, *State ex rel. McLeod v. C & L Corp.*[208] In rejecting the defendant corporation's argument that the SCUTPA required proof of common law fraud to establish a cause of action, the *McLeod* court looked to federal policy:

> Federal courts have held that unfair or deceptive acts as defined in the FTC Act need not constitute ordinary fraud . . . under the statute there is no need to show that a claim or representation was intended to deceive, but only that it had the *capacity or effect or tendency to deceive.*[209]

Following the decision in *McLeod*, the South Carolina Appel-

201. *See id.* at 202.
202. *Id.* at 201.
203. *Id.*
204. *Id.*
205. S.C. CODE ANN. §§ 39-5-10 to 39-5-560 (Law. Co-op. 1985).
206. *Id.* § 39-5-20(b).
207. Chuck's Feed & Seed Co., Inc. v. Ralston Purina Co., 810 F.2d 1289 (4th Cir. 1987) (exclusive dealing contract held to be an anti-competitive practice in violation of the SCUTPA's prohibition of unfair competition).
208. 280 S.C. 519, 525, 313 S.E.2d 334, 338 (1984).
209. *Id.* (emphasis added).

late Court dealt with the deception standard issue again in *Noack Enterprises v. Country Corner Interiors of Hilton Head Island, Inc.*,[210] a 1986 post-Cliffdale case. The *Noack* court held that for an unfair or deceptive trade practice to be actionable under the SCUTPA, the public interest has to be affected; the Act is not available to redress private wrongs unless this requirement is met.[211] The court reached this conclusion after finding consistency with the Federal Trade Commission's obligation to issue complaints only when the act or practice affects commerce.[212] The *Noack* court acknowledged the mandatory guidance deference provision and drew a comparison between the Federal Trade Commission's ability to issue complaints only in cases that involve commerce and the inclusion of a similar trade or commerce provision in the SCUTPA.[213] The court felt that since "the federal act prescribes a public interest requirement as a condition to enforcement, our act, to comport with the legislators intent, must be construed to contain a public interest requirement also."[214] A number of subsequent decisions upheld the public interest interpretation made by the *Noack* court.[215]

The holding in *Noack* is significant because the court carefully traced the parallel between the SCUTPA's public interest requirement and the FTCA. With the traditional deception policy already established by the *McLeod* case and followed by the strong deferential language of *Noack*, South Carolina appellate courts firmly established the tendency to deceive standard. Subsequently, the Supreme Court of South Carolina, in *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*,[216] held that "there is no need to show that a repre-

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210. 290 S.C. 475, 351 S.E.2d 347 (1986).

211. *Id.* at 479, 351 S.E.2d at 350.

212. *Id.*

213. *Id.* Section 39-5-10(b) of the South Carolina Unfair Trade Practices Act provides:

> "Trade" and "Commerce" should include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intagible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and *shall include any trade or commerce directly or indirectly affecting the people of this state.*

Id. (emphasis added). The Court interpreted this provision to mean that a questioned trade act or practice must affect the public interest. Noack Enters. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 479, 351 S.E.2d 347, 350 (1986).

214. *Noack Enterprises*, 290 S.C. at 479, 351 S.E.2d at 350.

215. Richland Wholesale Liquors v. Glenmore Distilleries Co., 818 F.2d 312 (4th Cir. 1987); Blanton Enters., Inc. v. Burger King Corp., 680 F. Supp. 753 (D.S.C. 1988); Drs. Steuer & Latham v. National Med. Enterprises, Inc., 672 F. Supp. 1489 (D.S.C. 1987); LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 370 S.E.2d 711 (1988); Barnes v. Jones Chevrolet Co., Inc., 292 S.C. 607, 358 S.E.2d 156 (1987); Key Co., Inc. d/b/a Great Games v. Fameco Distribs., Inc., 292 S.C. 524, 357 S.E.2d 476 (1987).

216. 294 S.C. 240, 363 S.E.2d 691 (1988).

sentation was intended to deceive but only that it had the capacity to do so,"[217] thereby expressly rejecting the *Cliffdale* standard.

The State of Washington has amassed an impressive list of deceptive trade practice cases litigated under the Washington Consumer Protection Act (WCPA).[218] In early cases, the Washington Supreme Court upheld the WCPA against claims that it was unconstitutionally vague,[219] and emphasized that the statute should be given a liberal construction based upon legislative intent.[220] The court similarly rejected arguments that good faith[221] and failure to prove an intent to deceive[222] should be adequate defenses in a deception case. In a number of cases, Washington courts noted the judiciary's responsibility to defer to federal interpretations of the

217. *Id.* at 242, 363 S.E.2d at 692. *Accord* Clarkson v. Orkin Exterminating Co., 761 F.2d 189 (4th Cir. 1985); Potomac Leasing Co. v. Bone & Glasco Industries, Inc., 294 S.C. 494, 366 S.E.2d 26 (1988).

218. WASH. REV. CODE ANN. § 19.86.010-.920 (1989).

219. State v. Black, 100 Wash. 2d 793, 676 P.2d 963 (1984); State v. Ralph Williams' North West Chrysler Plymouth, Inc., 87 Wash. 2d 298, 553 P.2d 423 (1976), *appeal dismissed*, 430 U.S. 952 (1977); Johnston v. Beneficial Management Corp. of America, 85 Wash. 2d 637, 538 P.2d 510 (1975); State v. Ralph Williams' North West Chrysler Plymouth, Inc., 82 Wash. 2d 265, 510 P.2d 233 (1973); State v. Reader's Digest Ass'n, Inc., 81 Wash. 2d 259, 501 P.2d 290 (1972), *appeal dismissed*, 411 U.S. 945 (1973).

220. Short v. Demopolis, 103 Wash. 2d 52, 691 P.2d 163 (1984); Salois v. Mutual of Omaha Ins. Co., 90 Wash. 2d 355, 581 P.2d 1349 (1978); State v. Ralph Williams' North West Chrysler Plymouth, Inc., 87 Wash. 2d 298, 553 P.2d 423 (1976), *appeal dismissed*, 430 U.S. 952 (1977); Evergreen Int'l v. American Casualty Co., 52 Wash. App. 548, 761 P.2d 964 (1988); Escalante v. Sentry Ins., 49 Wash. App. 375, 743 P.2d 832 (1987); Aubrey's R.V. Center, Inc., v. Tandy Corp., 46 Wash. App. 595, 731 P.2d 1124 (1987); St. Paul Fire & Marine Ins. Co. v. Updegrave, 33 Wash. App. 473, 656 P.2d 1130 (1983); Keyes v. Bollinger, 31 Wash. App. 286, 640 P.2d 1077 (1982); Tallmadge v. Aurora Chrysler Plymouth, Inc., 25 Wash. App. 90, 605 P.2d 1275 (1979); Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 51, 554 P.2d 349, 358 (1976) ("The declared purpose of the Consumer Protection Act is to compliment [sic] the federal trade laws in order to protect the public and foster fair and honest competition and to that end the act must be liberally construed."); Fisher v. Worldwide Trophy Outfitters, 15 Wash. App. 742, 551 P.2d 1398 (1976).

221. *Testo*, 16 Wash. App. at 51, 554 P.2d at 358; *Fisher*, 15 Wash. App. at 748, 551 P.2d at 1403.

222. *See supra* note 172. *See, e.g.*, Short v. Demopolis, 103 Wash. 2d 52, 691 P.2d 163 (1984); Bowers v. TransAmerica Title Ins. Co., 100 Wash. 2d 581, 675 P.2d 193 (1983); Haner v. Quincy Farm Chems., Inc., 97 Wash. 2d 753, 649 P.2d 828 (1982); Luxon v. Caviezel, 42 Wash. App. 261, 710 P.2d 809 (1985); Smith v. Sturm, Ruger & Co., Inc., 39 Wash. App. 740; 695 P.2d 600 (1985); McRae v. Bolstad, 32 Wash. App. 173, 646 P.2d 771 (1982), *aff'd and remanded*, 101Wash. 2d 161, 676 P.2d 496 (1984); Keyes v. Bollinger, 31 Wash. App. 286, 640 P.2d 1077 (1982); Tallmadge v. Aurora Chrysler Plymouth, Inc., 25 Wash. App. 90, 605 P.2d 1275 (1979).

Washington courts have also stated that actual deception need not be proven in order to establish a deception case. *See* State v. Ralph Williams' North West Chrysler Plymouth, Inc., 87 Wash. 2d 298, 553 P.2d 423 (1976), *appeal dismissed*, 430 U.S. 952 (1977); Tallmadge v. Aurora Chrysler Plymouth Inc., 25 Wash. App. 90, 605 P.2d 1275 (1979); Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 554 P.2d 349 (1976). Also, specific monetary damages need not be established. St. Paul Fire & Marine Ins. Co. v. Updegrave, 33 Wash. App. 473, 658, 656 P.2d 1130, 1133 (1983) ("The consumer need not show specific monetary damages to recover under the Act.").

FTCA.[223] On several occasions, however, the Washington Supreme Court stated that these interpretations provide guidance but are not absolutely binding. [224]

Since Washington courts applied the deception standard in the context of private actions under the WCPA,[225] a significant line of cases developed defining the statute's "public interest" require-

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223. State v. Black, 100 Wash. 2d 793, 676 P.2d 963 (1984); Lightfoot v. MacDonald, 86 Wash. 2d 331, 544 P.2d 88 (1976); Johnston v. Beneficial Management Corp. of America, 85 Wash. 2d 637, 538 P.2d 510 (1975); State v. Ralph Williams' North West Chrysler Plymouth, Inc., 87 Wash. 2d 298, 533 P.2d 423 (1976), *appeal dismissed*, 430 U.S. 952 (1977); State v. Reader's Digest Ass'n, Inc., 81 Wash. 2d 259, 501 P.2d 290 (1972); State v. Burlison, 38 Wash. App. 487, 490, 685 P.2d 1115, 1117 (1984) ("The courts of this state are specifically directed to be guided by federal court interpretations of those various federal statutes after which our Consumer Protection Act is patterned."); Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 554 P.2d 349 (1976).

Washington courts have similarly recognized that undefined terms in FTCA § 5 such as "deceptive trade practice" have a meaning well settled in federal trade regulation law. *See* State v. Ralph Williams' North West Chrysler Plymouth, Inc., 82 Wash. 2d 265, 510 P.2d 233 (1973); State v. Reader's Digest Ass'n, Inc., 81 Wash. 2d 259, 501 P.2d 290 (1972).

224. The Washington Supreme Court first addressed the responsibility of state courts to review federal precedent in 1972, and rejected the argument that the WCPA should only incorporate federal case law precedent existing on the date that the statute was enacted. The court held that this would be an improper conclusion since the statute does not adopt any federal judicial precedents but simply instructs state courts to be guided by federal interpretations. The WCPA:

> merely states that in construing the act the state courts are to be *guided* by the interpretation given by federal courts to federal statutes dealing with similar matters. In the final analysis, the interpretation of [the WCPA] is left to the state courts. This enables us to arrive at the statute's meaning by the same "gradual process of judicial inclusion and exclusion" used by the federal courts. When appropriate we will consider the pertinent federal court interpretations of Section 5 of the FTC Act. But in each case the question of what constitutes an "unfair method of competition" or an "unfair or deceptive act or practice" under [the Act] is for us, rather than the federal courts, to determine. Since federal judicial interpretations are *guiding* but not *binding*, we may consider all relevant federal precedent, including that decided after the enactment of [the WCPA].

Reader's Digest, 81 Wash. 2d at 275, 501 P.2d at 301. *See also Ralph Williams'*, 82, Wash. 2d at 271, 510; P.2d at 238 ("[W]e are statutorily instructed to look to appropriate federal authority for guidance. . . [but] are not conclusively bound by the relevant federal cases. . . .") (referring to federal cases construing the Clayton Antitrust Act); *Lightfoot*, 86 Wash. 2d at 336, 544 P.2d at 91 ("[I]n determining the scope of the [WCPA] and the types of acts or practices prohibited by it, *this court must look to the cases which have been decided under the federal act* . . . . In directing the Court to seek guidance from those cases, the legislature undoubtedly had in mind the fact that under the federal act the decision whether a practice or act is one which is proscribed, rests with the Federal Trade Commission . . . .") (emphasis added); Nordstrom, Inc. v. Tampourlos, 107 Wash. 2d 735, 733 P.2d 208 (1987); State v. Black, 100 Wash. 2d 793, 676 P.2d 963 (1984); Blake v. Federal Way Cycle Center, 40 Wash. App. 302, 310, 698 P.2d 578, 583 (1985) ("[T]he Act mentions sources to which Washington courts should look for guidance in construing its provisions. Among these are federal court interpretations of federal statutes dealing with matters similar to those involved in the Consumer Protection Act."); Keyes v. Bollinger, 31 Wash. App. 286, 640 P.2d 1077 (1982) (Comparing the statutory requirement of the WCPA with the federal Clayton Antitrust Act).

225. The WCPA was amended in 1970 to authorize a private action. WASH. REV. CODE ANN. § 19.86.080 (1989).

ment.[226] Recognition of this public interest requirement led to the development of a two-part test that had to be satisfied in order for a private action to be brought under the Act. In *Lightfoot v. MacDonald*,[227] the court held that for a private action to exist the plaintiff would have to establish a case based on affirmative answers to the following questions: (1) Has an act or practice prohibited by the WCPA been committed?; and (2) Would the attorney general reach a determination that the practice was in the public interest so as to warrant prosecution?[228]

Four years after *Lightfoot*, the Washington Supreme Court

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226. *See, e.g.*, Nordstrom, Inc. v. Tampourlos, 107 Wash. 2d 735, 733 P.2d 208 (1987); Hangman Ridge Training v. Safeco Title Ins. Co., 105 Wash. 2d 778, 719 P.2d 531 (1986); Bowers v. TransAmerica Title Ins. Co., 100 Wash. 2d 581, 675 P.2d 193 (1983); Haner v. Quincy Farm Chems., Inc., 97 Wash. 2d 753, 649 P.2d 820 (1982); Salois v. Mutual of Omaha Ins. Co., 90 Wash. 2d 355, 581 P.2d 1349 (1978); Lightfoot v. MacDonald, 86 Wash. 2d 331, 544 P.2d 88 (1976); Pacific Northwest Life Ins. Co. v. Turnbull, 51 Wash. App. 692, 754 P.2d 1269 (1988); Cuevas v. Montoya, 48 Wash. App. 871, 740 P.2d 858 (1987); Aubrey's R.V. Center v. Tandy Corp., 46 Wash. App. 595, 731 P.2d 1124 (1987); Luxon v. Caviezel, 42 Wash. App. 261, 710 P.2d 809 (1985); Blake v. Federal Way Cycle Center, 40 Wash. App. 302, 698 P.2d 578 (1985); Smith v. Sturm, Ruger & Co., Inc., 39 Wash. App. 740, 695 P.2d 600 (1985); McRae v. Bolstad, 32 Wash. App. 173, 646 P.2d 771 (1982), *aff'd and remanded*, 101 Wash. 2d 161, 676 P.2d 496 (1984); Keyes v. Bollinger, 31 Wash. App. 286, 640 P.2d 1077 (1982); Pilch v. Hendrix, 22 Wash. App. 531, 533, 591 P.2d 824, 826 (1979) ("To warrant application of the Consumer Protection Act there must be established either a pre-sale or post-sale deceptive act or practice affecting the public interest.").

227. 86 Wash. App. 331, 544 P.2d 88 (1976). Regarding the establishment of a public interest requirement the court stated:

> Since the purpose of the act is to protect the public interest, it is natural to assume that the legislature, in granting a private remedy in [the WCPA], intended to further implement the protection of that interest. It follows that an act or practice of which a private individual may complain must be one which also would be *vulnerable to a complaint by the attorney general under the Act.*

Id. at 334, 554 P.2d at 90 (emphasis added).

228. *Id.* The court also noted that the absence of an allowance for private actions under the FTCA should not deter the state from recognizing such an action under the WCPA and that the federal deference provision could be overlooked with respect to this issue:

> Since the federal act has no provision for private remedies, there are no federal cases to guide the court . . . except those cases which declare the purpose of the act in general, that is the purpose to protect the public interest. However, we are directed by the statute to look to "the various federal statutes dealing with the same or similar matter" in resolving questions which arise under the state act.
>
> The federal antitrust laws are relevant in that they also deal with problems of business practices, regulating, as they do, monopolies and combinations in restraint of trade . . . .
>
> We think the evident purpose of the legislature in providing a private remedy [in the WCPA] was much the same as that which Congress expressed in providing for treble damage actions under the antitrust laws. Its purpose was to enlist the aid of private individuals damaged by acts or practices which were forbidden in the acts, to assist in the enforcement of the laws. Such assistance is desirable only if it serves the public interest and implements the purpose of the statute.

Id. at 334-35, 544 P.2d at 90-91.

reevaluated this private action test in *Anhold v. Daniels*.[229] The court concluded that a cause of action would lie when the questioned conduct was unfair or deceptive, was within the sphere of trade or commerce, and impacted the public interest.[230] In effect, the court rejected a literal interpretation of the language in *Lightfoot* that the questioned deceptive conduct would have to be "vulnerable to a complaint by the Attorney General" before it would be actionable under WCPA.[231] In its discussion, the court further developed the concept of public interest and held that this requirement would be met when proof was established that: (1) the defendant, by unfair or deceptive acts or practices in conduct of trade or commerce, induced the plaintiff to act or refrain from acting; (2) the plaintiff suffered damage resulting from such action or failure to act; and (3) the defendant's deceptive acts or practices have the potential for repetition.[232]

The case law development of the private action test under the WCPA has been important in facilitating the acceptance of the federal tendency or capacity to deceive standard by Washington State courts. The traditional federal deception standard was first recognized in three 1976 cases,[233] and was slightly modified by the Washington Court of Appeals to include conduct that has a "tendency or capacity to deceive a substantial portion of the public."[234] This slight reformulation of the standard is in complete accord with the pre-*Cliffdale* federal deception standard and has been consistently applied in cases from 1976 to 1988.[235]

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229. 94 Wash. 2d 40, 614 P.2d 184 (1980).

230. *Id.* at 45, 614 P.2d at 188.

231. *See id.* at 45, 614 P.2d at 188.

232. *Id.* at 48, 614 P.2d at 188.

233. State v. Ralph Williams' North West Chrysler Plymouth, Inc., 87 Wash. 2d 298, 317, 553 P.2d 423, 437 (1976), *appeal dismissed*, 430 U.S. 952 (1977); Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 51, 554 P.2d 349, 358 (1976); Fisher v. World-Wide Trophy Outfitters, 15 Wash. App. 742, 748, 551 P.2d 1398, 1403 (1976).

234. Fisher v. World-wide Trophy Outfitters, 15 Wash. App. 742, 748, 551 P.2d 1398, 1403 (1976).

235. *See, e.g.*, Hangman Ridge Training v. Safeco Title Ins. Co., 105 Wash. 2d 778, 719 P.2d 531 (1986); Short v. Demopolis, 103 Wash. 2d 52, 691 P.2d 163 (1985); Bowers v. TransAmerica Title Ins. Co., 100 Wash. 2d 581, 675 P.2d 193 (1983); Haner v. Quincy Farm Chems., Inc., 97 Wash. 2d 753, 649 P.2d 828 (1982); State v. Ralph Williams' North West Chrysler Plymouth, Inc., 87 Wash. 2d 298, 553 P.2d 423 (1976), *appeal dismissed*, 430 U.S. 952 (1977); Aubrey's R.V. Center v. Tandy Corp., 46 Wash. App. 595, 731 P.2d 1124 (1987); Luxon v. Caviezel, 42 Wash. App. 261, 710 P.2d 809 (1985); Blake v. Federal Way Cycle Center, 40 Wash. App. 302, 698 P.2d 578 (1985); Smith v. Sturm, Ruger & Co., Inc., 39 Wash. App. 740, 695 P.2d 600 (1985); McRae v. Bolstad, 32 Wash. App. 173, 646 P.2d 771 (1982), *aff'd and remanded*, 101 Wash. 2d 161, 676 P.2d 496 (1984); Keyes v. Bollinger, 31 Wash. App. 286, 640 P.2d 1077 (1982); Tallmadge v. Aurora Chrysler Plymouth, Inc., 25 Wash. App. 90, 605 P.2d 1275 (1979); Grayson v. Nordic Constr. Co., 22 Wash. App. 143, 589 P.2d 283 (1978), *rev'd on other grounds*, 92 Wash. 2d 548, 599 P.2d 1271 (1979); Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 554 P.2d 349 (1976).

When the three-part, private action test set forth in *Anhold* was substantially revised in *Hangman Ridge Training v. Safeco Title Insurance Co.*,[236] the Washington Supreme Court clearly signalled that it was implicitly rejecting the *Cliffdale* standard. In *Hangman Ridge*, the court held that a private action could be pursued when an unfair deceptive act or practice[237] in the conduct of trade or commerce affected the public interest,[238] injured a plaintiff's business or property, and a causal link could be established between the deceptive practice and the injuries suffered.[239]

The importance of this case must be evaluated not only based upon the open acceptance of the capacity to deceive standard, but also upon the broad, pro-consumer language the court used in defining what constitutes the public interest requirement under the WCPA. The Court mandated that the defendant's acts be reviewed in order to determine whether they are part of a pattern or generalized course of conduct and whether there is a substantial potential for repetition.[240] These factors provide persuasive evidence that the

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Washington courts have also ruled that advertisements are deceptive even though they may be literally and technically correct or if they create deception by innuendo or by double meaning. *See* State v. Burlison, 38 Wash. App. 487, 685 P.2d 1115 (1984). Finally, a trade practice is deceptive if material facts are not disclosed. *Smith*, 39 Wash. App. at 747, 695 P.2d at 606.

236. 105 Wash. 2d 778, 719 P.2d 531 (1986).

237. The court held that a trade practice could be found to be deceptive absent an intention to deceive as long as it had a capacity to deceive a substantial portion of the public. The court noted that deterring deceptive conduct before injury occurs was the primary purpose of the capacity to deceive test. *Id.* at 785, 719 P.2d at 535.

238. The court broadly defined trade or commerce to include "the sale of assets or services, and any commerce directly or indirectly affecting the people of the State of Washington." *Id.*

239. *Id.* at 793, 719 P.2d at 535-39. The court recognized that the State of Washington was in a minority by requiring that private plaintiffs under the WCPA establish a public interest effect but refused to alter this requirement. *Id.* at 788, 719 P.2d at 537. This case constituted an outright rejection of the three-part public interest requirement put forth in *Anhold* and also provided that a per se unfair or deceptive trade practice exists whenever a statute which specifically enumerates unfair or deceptive acts or practices in commerce has been violated. Hangman Ridge Training v. Safeco Title Ins. Co., 105 Wash. 2d 778, 789, 719 P.2d 531, 535-36 (1986). For a more complete discussion of per se violations under the WCPA, *see* Tank v. State Farm Fire & Casualty Co., 105 Wash. 2d 381, 715 P.2d 1133 (1986); Blake v. Federal Way Cycle Center, 40 Wash. App. 302, 698 P.2d 578 (1985); Smith v. Sturm, Ruger & Co., Inc., 39 Wash. App. 740, 695 P.2d 600 (1985); McRae v. Bolstad, 32 Wash. App. 173, 646 P.2d 771 (1982), *aff'd and remanded*, 101 Wash. 2d 161, 676 P.2d 496 (1984); Keyes v. Bollinger, 31 Wash. App. 286, 640 P.2d 1077 (1982).

240. The court stated that in consumer transactions the following factors would be evaluated in order to establish the public interest requirement:

1). Were the alleged acts committed in the course of defendant's business?;
2). Are the acts part of a pattern or generalized course of conduct?;
3). Were repeated acts committed prior to the act involving plaintiff?;
4). Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff?; and
5). If the act complained of involved a single transaction, were many consum-

Washington Supreme Court intends to continue evaluating deception cases based upon rather vigorous pro-consumer policy interpretations of the WCPA established prior to *Cliffdale*.[241]

The Connecticut Unfair Trade Practices Act (CUTPA)[242] was enacted in 1973, and originally provided that state deceptive trade practices would be those "determined to be" unfair or deceptive by the Federal Trade Commission or the federal courts.[243] This deference provision was amended in 1976 to provide that Connecticut courts would only be "guided by" federal interpretations of FTCA section 5.[244] The perceived purpose of this change was to allow Connecticut courts to declare certain trade practices to be unlawful even if they had not been specifically declared to be in violation of the FTCA by federal authorities.[245] Courts considered this change necessary in order to effect the remedial nature of the CUTPA,[246] and to insure that the statute would be liberally construed and applied to

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ers affected or likely to be affected by it?

Hangman Ridge Training v. Safeco Title Ins. Co., 105 Wash. 2d 778, 790, 719 P.2d 531, 537-38 (1986). The court also provided that in a private dispute the following public interest factors would be considered: "1) Were the alleged acts committed in the course of defendant's business?; 2) Did defendant advertise to the public in general?; 3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others?; and 4) Did plaintiff and defendant occupy unequal bargaining positions?" *Id.* at 790-91, 719 P.2d at 538. *See also* McRae v. Bolstad, 32 Wash. App. 173, 646 P.2d 771 (1982), *aff'd and remanded*, 101 Wash. 2d 161, 166, 676 P.2d 496, 500 (1984) (Regarding when a private dispute becomes a public interest the court stated, "Evidence that others have been injured by similar deceptive representations is sufficient to establish the potential for repetition . . . . It is the likelihood that additional buyers will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest.").

241. The *Hangman Ridge* case public interest and deception standards have been upheld in an impressive string of recent cases. *See, e.g.*, Nordstrom Inc. v. Tampourlos, 107 Wash. 2d 735, 733 P.2d 208 (1987); Aubrey's R.V. Center v. Tandy Corp., 46 Wash. 2d 596, 731 P.2d 1124 (1987); Evergreen Int'l v. American Casualty Co., 52 Wash. App. 548, 761 P.2d 964 (1988); Pacific Northwest Life Ins. Co. v. Turnbull, 51 Wash. App. 642, 754 P.2d 1269 (1988); Jaramillo v. Morris, 50 Wash. App. 822, 750 P.2d 1301 (1988); Broten v. May, 49 Wash. App. 564, 744 P.2d 1085 (1987); Cuevas v. Montoya, 48 Wash. App. 871, 740 P.2d 858 (1987); Travis v. Washington Horse Breeder's Ass'n, 47 Wash. App. 361, 734 P.2d 956 (1987); Quimby v. Fine, 45 Wash. App. 175, 724 P.2d 403 (1986).

242. CONN. GEN. STAT. § 42-110a to 42-110q (West 1987 & Supp 1989).

243. 1973 Conn. Acts 615 (Reg. Sess.), § 2(a).

244. 1976 Conn. Acts 303 (Reg. Sess.), § 1.

245. Bailey Employment Sys., Inc. v. Hahn, 545 F. Supp. 62 (D. Conn. 1982). The court also stated that "[t]he Connecticut statute, like the federal act, was enacted in an attempt to foster honesty and full disclosure in the conduct of business. Any information—positive or negative—that would affect a buyer's decision whether or not to purchase, must be disclosed by the seller." *Id.* at 72.

246. *See, e.g.*, Web Press Servs. Corp. v. New London Motors, Inc., 203 Conn. 342, 525 A.2d 57 (1987); Russell v. Dean Witter Reynolds, Inc., 200 Conn. 172, 510 A.2d 972 (1986); Sportsmen's Boating Corp. v. Hensley, 192 Conn. 747, 474 A.2d 780 (1984); McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558, 473 A.2d 1185 (1984); Ivey, Barnum & O'Mara v. Indian Harbor Property, 190 Conn. 528, 461 A.2d 1369 (1983).

deceptive trade practices.[247] Connecticut courts, however, have also consistently acknowledged the obligation to refer to federal interpretations of the FTC when deciding how unfairness and deception standards should be established under the CUTPA.[248]

The case law development of Connecticut's deception standard is somewhat unusual when compared to other states discussed previously. Although no Connecticut case decision specifically discussed *Cliffdale*, Connecticut courts recognized the "likely to mislead" deception standard as early as 1977. In *Covenant Radio Corp. v. Ten Eighty Corp.*[249] WKSS radio station charged WTIC, a competing station, with engaging in unfair competition and committing unfair and deceptive trade practices by using the number 96 to promote its broadcast service.[250] The Federal Communications Commission had assigned both radio stations FM frequencies that were close to 96 megahertz. The defendant radio station argued that using the number 96 simply reflected an industry custom whereby FM stations would round off assigned frequency designations to the nearest whole number.[251]

The plaintiff radio station contended that the defendant's use of the number 96 was unfair since it violated public policy, and was deceptive because local listeners might be deceived about which station was using this particular designation.[252] The plaintiff urged the court to evaluate the deceptive nature of the trade practice in question based on the federal standard, which focused on "whether the

247. *See generally* Sportsmen's Boating Corp. v. Hensley, 192 Conn. 747, 474 A.2d 780 (1984); Murphy v. McNamara, 36 Conn. Supp. 183, 416 A.2d 170 (1979). Connecticut courts have also held that it is not necessary to establish an intent to deceive in order to pursue a deception action under CUTPA. Covenant Radio Corp. v. Ten Eighty Corp., 35 Conn. Supp. 1, 10, 390 A.2d 949, 955 (1977) ("Subjective intent to deceive on the part of the individual or business engaged in the challenge to practice need not be established."); *see also* Hinchcliffe v. American Motors Corp., 39 Conn. Supp. 107, 120, 471 A.2d 980, 987 (1982) ("For a trade practice to be deceptive, it must have a tendency and capacity to deceive. . . The consumer must be deceived in his initial contact with the challenged practice . . . . CUTPA protects the economically unsophisticated as well as the sophisticated.") (citation omitted). Connecticut courts have also recognized a public interest requirement under the CUTPA. *See* Ivey, Barnum & O'Mara v. Indian Harbor Property, 190 Conn. 528, 461 A.2d 1369 (1983). *See also* Web Press Servs. Corp. v. New London Motors, Inc., 203 Conn. 342, 354, 525 A.2d 57, 63 (1987) (CUTPA intended to provide relief to persons suffering "any ascertainable loss.").

248. *See supra* note 213. *See also* Bailey Employment Sys., Inc. v. Hahn, 545 F. Supp. 62 (D. Conn. 1982); *Russell*, 200 Conn. at 179, 510 A.2d at 976 ("This court has repeatedly held, in accordance with this statutory instruction, that Federal Trade Commission (FTC) rulings and cases under the Federal Trade Commission Act (FTC Act) *serve as a lodestar for interpretation of the open-ended language of CUTPA.*") (emphasis added). *Id.*

249. 35 Conn. Supp. 1, 390 A.2d 949 (1978).

250. *Id.* at 4, 390 A.2d at 954.

251. *Id.* at 3, 390 A.2d at 952.

252. *Id.* at 8, 390 A.2d at 954.

ignorant, unthinking and credulous person would tend to be deceived."[253] The defendant radio station advocated adoption of a more flexible deception standard, one that would permit a finding of deception only when the challenged practice was "likely to deceive or mislead a person exercising such reasonable care and observation as the public generally is capable of exercising."[254] The defendant further urged the court to look beyond the carelessness or ignorance of uninformed consumers in deciding whether or not a trade practice "did, in fact, have a deceptive impact."[255]

The court held the ignorant person standard advocated by the plaintiff to be "unrealistic," since "most trade practices, particularly advertisements, would tend somewhat to deceive persons ignorant of the underlying subject matter."[256] The court felt that under this standard, most trade practices could be deemed deceptive and that application of the standard would result in "unnecessarily severe repercussions for trades and businesses" regulated by state consumer protection statutes.[257] The interesting aspect of this case is that the court deferred to and adopted the federal unfairness standard,[258] and also noted the tendency to deceive standard that the Federal Trade Commission followed in deception cases.[259] Despite this acknowledgement, the court chose to accept the defendant's reasonable public standard for evaluating deceptive practices.[260]

The *Covenant Radio* case has not been consistently applied in other deception cases filed under the CUTPA. These subsequent decisions referred to the federal tendency or capacity to deceive standard and have even contradicted the result in *Covenant Radio* by stating that deception was to be measured based upon how the "unthinking, ignorant, and credulous" consumer would react to the

253. *Id.* at 10, 390 A.2d at 955 (citing Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942)).

254. Covenant Radio Corp. v. Ten Eighty Corp., 35 Conn. Supp. 1, 10, 390 A.2d 949, 955 (1978).

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* Connecticut courts have continued to follow the Federal Unfairness Policy without making any alterations to the standard. *See also* Dadonna v. Liberty Mobile Home Sales, Inc., 209 Conn. 243, 550 A.2d 1061 (1988); Sportsmen's Boating Corp. v. Hensley, 192 Conn. 747, 474 A.2d 780 (1984); Murphy v. McNamara, 36 Conn. Supp. 183, 416 A.2d 170 (1979).

259. Covenant Radio Corp. v. Ten Eighty Corp., 35 Conn. Supp. 1, 10, 390 A.2d 940, 955 (1978) ("For a trade practice to be deceptive, it must have a tendency and capacity to deceive the consumer . . . . Additionally, the consumer must be deceived in his initial contact with the challenged practice.").

260. *Id.* at 11, 390 A.2d at 955.

questioned practice.[261] In *Hinchliffe v. American Motors Corp.*,[262] the Connecticut Superior Court further recognized that the current standard had been characterized as unrealistic in *Covenant Radio*.[263] The court seemed relatively unconcerned about this contradiction given what the court considered to be appropriate limitations and guidelines to be used in applying the tendency to deceive standard.[264]

The deception standard issue under the CUTPA has been further clouded by other state court decisions holding that a trade practice would be considered deceptive if it violated public policy.[265] In effect, this latter approach to evaluating deceptive trade practices applies the federal unfairness standard to deception cases, and has resulted in a melding of the unfairness and deception concepts under the Connecticut statute.[266]

Based on this unusual case line development, it would be impru-

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261. Murphy v. McNamara, 36 Conn. Supp. 183, 190, 416 A.2d 170, 175 (1979). "Through the CUTPA, protection must be given to those who do not have the economic sophistication or the awareness possessed by others who may be less concerned about credit; the act must be applied to protect the *unthinking, the unsuspecting and the credulous* as well as the sophisticated . . . . In evaluating the tendency of advertising to deceive, . . . [the court] is bound to protect the public in general, *the unsuspecting as well as the skeptical*." (emphasis added) (citing Doherty, Clifford, Steers & Shenfield, Inc. v. FTC, 392 F.2d 921, 926 (6th Cir. 1968)); Bailey Employment Sys., Inc. v. Hahn, 545 F. Supp. 62, 67 (D. Conn. 1982) ("[I]n evaluating that tendency or capacity, it is 'not to the most sophisticated readers but rather to the lease' that the courts should look.") (citing Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961)). *See also* McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558, 473 A.2d 1185 (1984).

262. 39 Conn. Supp. 107, 471 A.2d 980 (1982). "The standard utilized by the court for determining whether the defendant's promotion of [the product] would have a deceptive impact on a consumer, is the standard applicable to an unthinking, ignorant and credulous person." *Id.* at 120, 471 A.2d at 987.

263. *Id.* at 121, 471 A.2d at 987-88.

264. The court noted the following limitations and guidelines:

> 1) It is improper to speculate that the public will place a patently absurd interpretation on an advertisement.
>
> 2) An advertiser can not be charged with liability in respect of every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or the feeble minded.
>
> 3) A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.
>
> 4) Prevention of the deception of the gullible and credulous as well as the cautious and knowledgeable is a principle which is not to be "applied uncritically or pushed to an absurd extreme."

Id. at 121-22, 471 A.2d at 988.

265. *See, e.g.*, Web Press Servs. Corp. v. New London Motors, Inc., 203 Conn. 342, 525 A.2d 57 (1987); Sportsmen's Boating Corp. v. Hensley, 192 Conn. 747, 474 A.2d 780 (1984).

266. *See, e.g.*, Web Press Servs. Corp. v. New London Motors, Inc., 203 Conn. 342, 355, 525 A.2d 57, 64 (1987) ("[A] violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy."); Sportsmen's Boating Corp. v. Hensley, 192 Conn. 747, 474 A.2d 780 (1984); Gibbs v. Mase, 11 Conn. App. 289, 526 A.2d 7, 10-11 (1987); Hinchliffe v. American Motor Corp., 390 Conn. Supp. 107, 471 A.2d 980 (1982).

dent to characterize Connecticut courts as following either the traditional deception standard or the standard advocated by the *Cliffdale* case. A complete reading of the cases, however, indicates a high threshold level of protection for consumers in deception cases.[267] Nevertheless, given that Connecticut recognized a standard comparable to *Cliffdale* before any other state with a federal deference provision, there is a solid foundation for complete acceptance of the likely to mislead deception standard under the CUTPA.

The Massachusetts Regulation of Business Practice and Consumer Protection Act (MBPA) has been the subject of consumer litigation since 1974.[268] In the early cases litigated under the MBPA, Massachusetts courts noted the broad impact[269] that the statute was intended to have in order to provide a "proper disclosure of information and a more equitable balance in the relationship of consumers to persons conducting business activities."[270] The courts consistently recognized the statute's federal deference provision[271] and were quick to adopt several subparts of the federal deception standard. Massachusetts courts held that knowledge of falsity,[272] actual reliance,[273] and intention to deceive[274] are not critical elements in an

267. The CUTPA has been held to apply to attorneys, Heslin v. Connecticut Law Clinic of Trantolo & Trantolo, 190 Conn. 510, 461 A.2d 938 (1983), and the insurance industry, Mead v. Burns, 199 Conn. 651, 509 A.2d 11 (1986).

268. In Commonwealth v. DeCotis, 366 Mass. 234, 316 N.E.2d 748 (1974), the first case decided under the MBPA, the Massachusetts Supreme Judicial Court noted that the statute "created new substantive rights by making conduct unlawful which was not unlawful under the common law for any prior statute." *Id.* at ____, 316 N.E.2d at 755. *See also* Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 382 N.E.2d 1065 (1978).

269. Purity Supreme, Inc. v. Attorney General, 380 Mass. 762, ____, 407 N.E.2d 297, 301 (1980); Heller v. Silverbranch Constr. Corp., 376 Mass. 621, ____, 382 N.E.2d 1065, 1069 (1978); Slaney v. Westwood Auto, Inc. 366 Mass. 688, ____, 322 N.E.2d 768, 772 (1975).

270. Commonwealth v. DeCotis, 366 Mass. 234, ____, 316 N.E.2d 748, 752 (1974).

271. Datacomm Interface, Inc. v. ComputerWorld, 396 Mass. 760, 489 N.E.2d 185 (1986); Nei v. Burley, 388 Mass. 307, 446 N.E.2d 674 (1983); Purity Supreme, Inc. v. Attorney General, 380 Mass. 762, 407 N.E.2d 297 (1980); Mechanics Nat'l Bank of Worcester v. Killeen, 377 Mass. 100, 384 N.E.2d 1231 (1979); Lowell Gas Co. v. Attorney General, 377 Mass. 37, ____, 385 N.E.2d 240, 249 (1979); Heller v. Silverbranch Constr. Corp., 376 Mass. 621, ____, 382 N.E.2d 1065, 1069 (1978); Schubach v. Household Finance Corp., 376 N.E.2d 140, 141 (Mass. 1978) (Relying on Federal Trade Commission decisions the court held that the filing of law suits by collection agencies in such a way so as to precipitate default judgements violated the MBPA.); Slaney v. Westwood Auto, Inc., 366 Mass. 688, ____, 322 N.E.2d 768, 773 (1975).

272. Massachusetts v. Hale, 618 F.2d 143 (1st Cir. 1980); Slaney v. Westwood Auto, Inc., 366 Mass. 688, 322 N.E.2d 768 (1975).

273. *See supra* note 272, *see also* International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 443 N.E.2d 1308 (1983); Fraser Eng'g Co., Inc. v. Desmond, 26 Mass. App. Ct. 99, 524 N.E.2d 110 (1988). The Massachusetts Supreme Judicial Court, however, held in one case that a plaintiff must demonstrate "causal connection between the deception and the loss and that the loss was foreseeable as a result of the deception." *International Fidelity*, 387 Mass. at ____, 443 N.E.2d at 1314.

action filed under the MBPA.

Massachusetts courts first explained the importance of the FTCA's impact upon the MBPA in *Slaney v. Westwood Auto, Inc.*[275] This acknowledgement of the federal statute was soon followed by adoption of the federal unfairness standard as applied to cases under the MBPA.[276] With regard to defining "deceptive" trade practices under the MBPA, however, Massachusetts did not adopt a verbatim recitation of the tendency to deceive standard.

In *Lowell Gas Co. v. Attorney General*,[277] the Massachusetts Attorney General filed a complaint alleging that privately owned utility companies had committed unfair and deceptive trade practices by allocating short-term debt interest expense to inventory cost of gas charged to consumers.[278] The court held that a trade practice is deceptive "if it could reasonably be found to have caused a person to act differently from the way he otherwise would have acted."[279]

The *Lowell* deception standard has been upheld consistently in cases extending from 1979 through 1988.[280] The *Cliffdale* deception standard has not been mentioned in these subsequent deception cases, and a close reading of the opinions reveals that Massachusetts courts view the *Lowell* deception standard as setting a high threshold level of protection for consumers.

For example, in *Purity Supreme Inc. v. Attorney General*,[281] a regulation promulgated by the state attorney general pursuant to the MBPA was challenged as being more restrictive than comparable

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274. *See generally* Fraser Eng'g Co., Inc. v. Desmond, 26 Mass. App. Ct. 99, 524 N.E.2d 110 (1988) and Giannasca v. Everett Aluminum, Inc., 13 Mass. App. Ct. 208, 431 N.E.2d 596 (1982).

275. 366 Mass. 688, 322 N.E.2d 768 (1975). "For purposes of uniformity and certainty of construction, Massachusetts along with a few other states, has thus wholly incorporated the [FTCA] into its statute." *Id.* at 694 n.8, 322 N.E.2d at 773 n.8.

276. *See generally* Datacomm Interface, Inc. v. ComputerWorld, 396 Mass. 760, 489 N.E.2d 185 (1986); Purity Supreme, Inc. v. Attorney General, 380 Mass. 762, 407 N.E.2d 297 (1980); PMP Assocs., Inc. v. Globe Newspaper Co., 366 Mass. 593, 321 N.E.2d 915 (1975); Wasserman v. Agnastopoulos, 22 Mass. App. Ct. 672, 497 N.E.2d 19 (1986); N.J. Genderon Lumber v. Great Northern Homes, 8 Mass. App. Ct. 411, 395 N.E.2d 457 (1979).

277. 377 Mass. 37, 385 N.E.2d 240 (1979).

278. *Id.* at ____, 385 N.E.2d at 242.

279. *Id.* at ____, 385 N.E.2d at 249; *see also* Spence v. Boston Edison Co., 390 Mass. 604, ____, 459 N.E.2d 80, 87 (1983) ("Courts have deliberately avoided setting down a clear definition of conduct constituting a [deceptive trade practice].").

280. *See generally* Rizzuto v. Joy Mfg. Co., 834 F.2d 7 (1st Cir. 1987); Kazmaier v. Wooten, 761 F.2d 46 (1st Cir. 1985); Puretest Ice Cream, Inc. v. Kraft, Inc., 614 F. Supp. 994 (D. Mass. 1985); Purity Supreme, Inc. v. Attorney General, 380 Mass. 762, 407 N.E.2d 297 (1980); Fraser Eng'g Co., Inc. v. Desmond, 26 Mass. App. Ct. 99, 524 N.E.2d 110 (1988); Grossman v. Waltham Chem. Co., 14 Mass. App. Ct. 932, 436 N.E.2d 1243 (1982); Mongeau v. Boutelle, 10 Mass. App. Ct. 246, 407 N.E.2d 352 (1980).

281. 380 Mass. 762, 407 N.E.2d 297 (1980).

Federal Trade Commission practices concerning the same type of activities.[282] The court held that the only limitation on the Massachusetts Attorney General's power to interpret the MBPA was that definitions not be inconsistent with the FTC and federal court decisions.[283] The court also noted that Massachusetts was not forbidden to adopt rules and regulations that were more restrictive than those provided by the Federal Trade Commission despite the MBPA's federal deference provision.[284]

The *Purity Supreme* holding indicates that Massachusetts courts would view any deception definition as inconsistent with FTC decisions if it is less restrictive than the federal definition. Should Massachusetts courts continue to follow this rule of interpretation, and there is every reason to expect that they will, it is very doubtful that *Cliffdale* will have significant impact on future deception cases litigated under the Massachusetts Business Practice Act.[285] The line of MBPA deception cases indicates that Massachusetts courts will defer to federal interpretations only when those decisions offer increased consumer protection as compared to that afforded by the Massachusetts Little FTC Act.

Finally, Vermont is the only state that has directly addressed the impact of the *Cliffdale* deception standard under the state's Little FTC Act. In *Poulin v. Ford Motor Co., Inc.*,[286] a purchaser filed an action under the Vermont Consumer Fraud Act (VCFA)[287] against a dealer/manufacturer of limited edition automobiles.[288] In analyzing the alleged misrepresentations made by the dealer, the Vermont court noted that a significant number of federal courts recognized that a practice was deceptive if it had a tendency or capacity to deceive.[289] The court, however, quoted excerpts from the *Inter-*

282. *Id.* at ____, 407 N.E.2d at 306.

283. *Id.* at ____, 407 N.E.2d at 304. The court stated that "the Massachusetts statute thus incorporates the extensive body of Federal administrative and decisional law under the FTC Act . . . insofar as it relates to definitions of 'unfair' and 'deceptive.' " *Id.* at ____, 407 N.E.2d at 301.

284. *Id.* at ____, 407 N.E.2d at 309.

285. Massachusetts courts have also held that failure to disclose a material fact constitutes deception under the MBPA. *See* Grossman v. Waltham Chem. Co., 14 Mass. App. Ct. 932, 436 N.E.2d 1243 (1982); Mongeau v. Boutelle, 10 Mass. App. Ct. 246, 407 N.E.2d 352 (1980). Another court has held "that a negligent misrepresentation of fact the truth of which is reasonably capable of ascertainment is an unfair and deceptive act or practice within the meaning of [MBPA]." Glickman v. Brown, 21 Mass. App. Ct. 227, 229, 486 N.E.2d 737, 741 (1985).

286. 147 Vt. 120, 513 A.2d 1168 (1986).

287. VT. STAT. ANN. tit. 9, §§ 2451-2462 (1984 & Supp. 1989).

288. *Poulin*, 147 Vt. at ____, 513 A.2d at 1170.

289. *Id.* at ____, 513 A.2d at 1171.

national Harvester[290] case that detailed the critical elements of the likely to mislead deception standard.[291] The court concluded by stating that "it is unnecessary to determine which standard should be adopted for purposes of this case under our Act, because in light of the facts presented here, both standards are satisfied."[292]

In a subsequent 1988 case, *State v. Stedman*,[293] the Vermont Supreme Court similarly cited both the traditional deception standard and the *Cliffdale* standard in analyzing whether the owner of a ski area was responsible for the deceptive misrepresentations of an agent operator.[294] Although the court declined to hold the owner of the ski area liable,[295] it offered no additional analysis of the two conflicting deception standards.[296]

The heightened level of deference accorded federal interpretations by Vermont courts was also evident in a 1979 unfair trade practice case. In *Christie v. Dalmig, Inc.*,[297] the Vermont Attorney General had promulgated a regulation pursuant to the VCFA providing that the sale of goods or services to a consumer and the subsequent failure of a seller to honor express and implied warranties with respect to such goods or services constituted an unfair and deceptive trade practice under the Little FTC Act.[298] The complainant argued that the rule was stricter than a comparable regulation adopted by the Federal Trade Commission based on its unfairness doctrine, and therefore, the attorney general's rule was an illegal restriction on trade and commerce.[299] The *Christie* court reviewed the determinative factors of the federal unfairness standard and held that the state attorney general's regulation was overly broad and invalid.[300] This severe limitation of rule making power under the VCFA suggests extreme deference to federal decisions regarding unfair and deceptive trade practices. Given that the Vermont Supreme Court has already recognized the *Cliffdale* standard, it is very likely that this

290. 104 F.T.C. 949 (1984).

291. Poulin v. Ford Motor Co., 147 Vt. at ____, 513 A.2d at 1171.

292. *Id.* at ____, 513 A.2d at 1172. The court also noted in *Poulin* that intent to deceive is not required to bring a deception action under the VCFA. *Id.* at ____, 513 A.2d at 1172-73.

293. 149 Vt. 594, 547 A.2d 1333 (1988).

294. *Id.* at ____, 547 A.2d at 1335.

295. *Id.* at ____, 547 A.2d at 1334-35.

296. The *Stedman* court also held that omissions of material fact are deceptive under the state statute. *Id.* at ____, 547 A.2d at 1335.

297. 136 Vt. 597, 396 A.2d 1385 (1979).

298. *Id.* at 600, 396 A.2d at 1387.

299. *Id.* at 601, 396 A.2d at 1388.

300. *Id.* at 600-01, 396 A.2d at 1387-88. *See also* Herschenson v. Lake Champlain Motors, Inc., 139 Vt. 219, 424 A.2d 1075 (1981) (vacating an award that had been based on the Attorney General regulation struck down in the *Christie* case).

standard will eventually be formally adopted in a subsequent deception case.

2. Optional Guidance.—The Consumer Protection Acts of New Hampshire[301] and Arizona[302] provide that state courts "may be guided by" the interpretations given FTCA section 5 by the federal courts and the Federal Trade Commission. One New Hampshire court judicially recognized the federal deference provision contained in the New Hampshire Consumer Protection Act (NHCPA).[303] There have been no cases brought under the NHCPA, however, that specifically addressed the issue of how deception should be defined under the Act. Consequently, it is uncertain whether New Hampshire will adopt the *Cliffdale* deception standard.

The State of Arizona established a strong public policy position regarding the protection of consumers against deceptive trade practices.[304] In addition to the Arizona Consumer Fraud Act (ACFA),[305] Arizona enacted an unfair sales act and a fraudulent advertising act.[306] Courts recognized the remedial nature of the ACFA and stated that the Act is to be broadly applied in order to protect consumers.[307] Under the ACFA, a private right of action has been judicially inferred, despite a lack of express language in the statute conferring such a right.[308] In private actions the consumer must establish that there was reliance or actual deception and that an injury or damage was sustained.[309] A comparable action brought on

301. "It is the intent of the legislature that in any action or prosecution under this [statute], the courts *may be guided* by the interpretation and the construction given section 5(a)(1) of the Federal Trade Commission Act . . . by the Federal Trade Commission and the federal courts." N.H. REV. STAT. ANN. § 358-A:13 (1984 & Supp. 1988) (emphasis added).

302. "It is the intent of the legislature that, in construing the provisions of [this statute], that the courts *may use as a guide* interpretations given by the federal trade commission and the federal courts to §§ 45, 52 and 55(a)(1) tit. 5, U.S.C.A. of the . . . the federal trade commission act." ARIZ. REV. STAT. ANN. § 44-1522(B) (1987) (emphasis added).

303. New Hampshire Auto. Dealers Ass'n, Inc. v. General Motors Corp., 620 F. Supp. 1150, 1157 (D.N.H. 1985).

304. *See* Dollar A Day Rent A Car Sys., Inc. v. Mountain States Tel. & Tel. Co., 22 Ariz. App. 270, ____, 526 P.2d 1068, 1073 (1974).

305. ARIZ. REV. STAT. ANN. §§ 44-1521 to 44-1534 (1987).

306. The act concerning fraudulent advertising appears at ARIZ. REV. STAT. ANN. § 44-1481 (1987). The unfair sales act has been repealed.

307. State *ex rel.* Corbin v. United Energy Corp. of Am., 151 Ariz. 45, 725 P.2d 752 (1986); State *ex rel.* Corbin v. Hovatter, 144 Ariz. 430, 698 P.2d 225 (1985); Madsen v. Western Am. Mortgage Co., 143 Ariz. 614, 694 P.2d 1228 (1985); People *ex rel.* Babbitt v. Green Acres Trust, 127 Ariz. 160, 618 P.2d 1086 (1980). In 1981 an amendment to the ACFA brought securities violations within the purview of the statute. *See* State *ex rel.* Corbin v. Pickrell, 136 Ariz. 587, 667 P.2d 1304 (1983).

308. Sellinger v. Freeway Mobile Home Sales, Inc., 110 Ariz. 573, 576, 521 P.2d 1119, 1121-22 (1974).

309. *Id.* at 576, 521 P.2d at 1122. *See also* Peery v. Hansen, 120 Ariz. 266, 585 P.2d

behalf of the state by the attorney general does not require a similar showing.[310] Also, it is not necessary to establish specific intent to deceive in order to formulate a deceptive trade practice action.[311]

Arizona courts consistently noted the obligation to review federal precedent based on the ACFA's federal deference provision.[312] The deference provision has been viewed as complementing the strong public policy toward consumer protection and as effectuating the purpose of the ACFA "to provide a remedy for injured consumers who need such protection to counteract the disproportionate bargaining power which is typically present in consumer transactions."[313] As further indication of this public policy commitment, Arizona courts sanctioned the awarding of punitive damages under the statute and ruled that consumer plaintiffs may prove their claims by a preponderance of evidence (versus a demonstration of clear and convincing evidence).[314]

The federal tendency or capacity to deceive standard has been adopted in Arizona through case law, and courts noted that interpretations of the federal statute should be used in determining what constitutes consumer fraud under the ACFA. Moreover, Arizona adopted the traditional federal deception standard in a post-*Cliffdale* case. In *Madsen v. Western American Mortgage Co.*,[315] the court stated that the tendency or capacity to deceive standard encompassed representations that "convey misleading impressions to consumers even though interpretations that would not be misleading also are possible."[316] The court further noted that despite technical correctness, a representation would still be ruled deceptive if it had the capacity to mislead.[317]

In the *Madsen* case, the court also concluded that in evaluating

574 (1978).

310. Babbitt v. Green Acres Trust, 127 Ariz. 160, ____, 618 P.2d 1086, 1094 (1980).

311. State *ex rel.* Babbitt v. Goodyear Tire & Rubber Co., 128 Ariz. 483, ____, 626 P.2d 1115, 1118 (1981).

312. State *ex rel.* Corbin v. United Energy Corp. of Am., 151 Ariz. 45, ____, 725 P.2d 752, 756 (1986); Madsen v. Western Am. Mortgage Co., 143 Ariz. 614, ____, 694 P.2d 1228, 1232 (1985); Nataros v. Fine Arts Gallery of Scottsdale, Inc., 126 Ariz. 44, 612 P.2d 500 (1980), and *supra* notes 248-49.

313. Dunlap v. Jimmy GMC of Tucson, Inc., 136 Ariz. 338, ____, 666 P.2d 83, 89 (1983).

314. *Id.* at ____, 666 P.2d at 87-88.

315. 143 Ariz. 614, 694 P.2d 1228 (1985).

316. *Id.* at ____, 694 P.2d at 1232. Arizona courts have also adopted the Federal Trade Commission's "substantial numbers" test. *See* People *ex rel.* Babbitt v. Green Acres Trust, 127 Ariz. 160, ____, 618 P.2d 1086, 1093 (1980).

317. *Id.* The court also held that misrepresentations or deceptive practices that are corrected before the consumer agrees to a contract will not be found to be deceptive under the ACFA. *Id.*

representations to determine deception, the federal "least sophisticated reader" test should be used.[318] Subsequent cases elaborated on the adoption of the traditional federal deception standard, and incorporated the general rule that materal omissions in advertisements or representations are deceptive under the ACFA.[319] Based on this strong post-*Cliffdale* case law support of the traditional deception standard, it is unlikely that Arizona will adopt the "likely to mislead" approach.

3. Guidance to the Extent Possible.—The Consumer Protection Acts of New Mexico[320] and Texas[321] provide that state courts should be "guided to the extent possible" by federal interpretations of the FTCA in deciding what constitutes a deceptive trade practice. Courts held that the New Mexico Unfair Practices Act (NMUPA) has a broad-based application.[322] Although the statute contains a federal deference provision, it also includes an inexhaustive list of practices that are unfair or deceptive under the NMUPA.[323] This particular provision specifies that a representation is deceptive if it is "knowingly made in connection with the sale, lease, rental or loan of goods or services in the extention of credit or in the collection of debts by any person in the regular course of his trade or commerce, which may, *tends to or does deceive or mislead any person.*"[324] Accordingly, the traditional tendency to deceive deception standard has been codified in the New Mexico statute.

In *Richardson Ford Sales, Inc. v. Johnson*,[325] a post-*Cliffdale* case, the New Mexico Court of Appeals ruled that state courts may not disregard those deceptive trade practices specifically defined

318. *Id.* However, deceptive acts or practices must have been performed willfully before civil penalties can be imposed. *See* State *ex rel.* Corbin v. United Energy Corp. of Am., 151 Ariz. 45, ____, 725 P.2d 752, 758 (1986).

319. *See, e.g.*, State *ex rel.* Corbin v. Goodrich, 151 Ariz. 118, 726 P.2d 215 (1986); Villegas v. Transamerica Fin. Servs., Inc., 147 Ariz. 100, 708 P.2d 781 (1985). *See also* State *ex rel.* Corbin v. United Energy Corp. of Am., 151 Ariz. 45, ____, 725 P.2d 752, 756 (1986) (The Federal Trade Commission Act should be used in determining what constitutes consumer fraud.).

320. "It is the intent of the legislature that in construing [this statute] of the Unfair Practices Act the courts *to the extent possible will be guided by* the interpretations given by the federal trade commission and the federal courts." N.M. STAT. ANN. § 57-12-4 (1987) (emphasis added).

321. "It is the intent of the legislature that in construing [this statute] the courts *to the extent possible will be guided* by . . . the interpretations given by the Federal Trade Commission and federal courts to section 5(a)(1) of the Federal Trade Commission Act . . . ." TEX. BUS. & COM. CODE ANN. § 17.46(c)(1) (Vernon 1987) (emphasis added).

322. Ashlock v. Sunwest Bank of Roswell, N.A., 107 N.M. 100, 753 P.2d 346 (1988).

323. N.M. STAT. ANN. § 57-12-2C (1987).

324. *Id.* § 57-12-2C(14).

325. 100 N.M. 779, 676 P.2d 1344 (1984).

under the NMUPA in favor of a federal interpretation based upon the statute's deference provision.[326] The court held that the "statute is to be read and given effect as written," and that if the court abrogated its responsibility in this regard it "would not be giving effect to the legislative definitions."[327] The *Richardson* court further stated that since the NMUPA did not address the issue of intention to deceive, it would be appropriate for New Mexico to adopt the aspect of the federal law that does not require such intent.[328] In concluding that a deceptive trade practice had been committed, the court specifically noted the statute's allowance for a finding of deception when the omission of a material fact tends to deceive the customer.[329]

The substance of the New Mexico Court of Appeals' ruling was impliedly upheld in a subsequent deception case. In *Ashlock v. Sunwest Bank of Roswell, N.A.*,[330] the New Mexico Supreme Court held that four elements must be established in order to invoke the NMUPA:

> First, the complaining party must show that the party charged made an "oral or written statement, visual description or other representation" that was either false or misleading. Second, the false or misleading representation must have been "knowingly made in the connection with the sale, lease, rental or loan of goods or services in the extention of credit or . . . collection of debts." Third, the conduct complained of must have occurred in the regular course of the representers trade or commerce. And, fourth, the representation must have been of the type that "may *tends to or does deceive or mislead any person.*"[331]

Given that *Ashlock* constitutes an affirmation of the *Richardson* holding, New Mexico has firmly established the tendency to deceive deception standard in post-*Cliffdale* cases. Therefore, it is unlikely that New Mexico will adopt a change in deception standards.

The Texas Deceptive Trade Practices-Consumer Protection Act

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326. *Id.* at ____, 676 P.2d at 1347.

327. *Id.* at ____, 676 P.2d at 1347. *See also* State Farm Fire & Casualty Co. v. Price, 101 N.M. 438, ____, 684 P.2d 524, 533 (1984) ("A party claiming a violation of the Unfair Practices Act must rely on one or more of the specific violations enumerated in the Act and when the trial court is going to rule and deny relief, present that specific violation to the trial court.").

328. *Richardson* at ____, 676 P.2d at 1347. *See also* Ashlock v. Sunwest Bank of Roswell, N.A., 107 N.M. 100, ____, 753 P.2d 346, 347-48 (1988).

329. Richardson Ford Sales, Inc. v. Johnson, 100 N.M. 779, ____, 676 P.2d 1344, 1347-48 (1984). Nondisclosures must, however, be made knowingly. *Id.*

330. 107 N.M. 100, 753 P.2d 346 (1988).

331. *Id.* at ____, 753 P.2d at 347 (emphasis added).

(TDTPA)[332] includes a liberal statutory construction [333] provision and a detailed listing of deceptive trade practices.[334] Beginning with the early deception cases litigated under the TDTPA, Texas courts acknowledged the legislature's intent that courts rely on the interpretations of the FTC and federal courts.[335] The tendency to deceive standard was first recognized in 1972 in *Wesware, Inc. v. State*,[336] and has been upheld consistently in a series of post-*Cliffdale* cases.[337] In an effort to maintain the basic purpose of the act, state courts adopted various aspects of the traditional deception standard including the rule that intention to deceive is not required in order to establish a cause of action.[338] More importantly, Texas impliedly rejected the *Cliffdale* standard by holding that a practice is deceptive if it "has a tendency to deceive the ignorant, the unthinking, and the credulous who do not stop to analyze but are governed by appearances and general impressions."[339] Courts recognized this test in

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332. TEX. BUS. & COM. CODE ANN. §§ 17.01-.826 (Vernon 1987).

333. *Id.* § 17.44.

334. *Id.* § 17.46.

335. Spradling v. Williams, 553 S.W.2d 143, 145 (Tex. Civ. App. 1977); Wesware, Inc. v. State, 488 S.W.2d 844, 848 (Tex. Civ. App. 1972). *See also* Sam Montgomery Oldsmobile Co. v. Johnson, 624 S.W.2d 237 (Tex. App. 1981). The court stated that "the basic purpose of this Act, as shown by the legislative intent, was to guarantee to the consumer the greatest possible knowledge about any potential undesirable features of a product. Texas courts have followed the Federal Trade Commission and federal courts in applying the Act." *Id.* at 240-41.

336. 488 S.W.2d 844 (Tex. Civ. App. 1972). Regarding the court's obligation to defer to the interpretations of the Federal Trade Commission and federal courts, the majority stated:

> The similarily of [the TDPTA] to section 5(a)(1) of the Federal Trade Commission Act is obvious. It is the intent of the Legislature . . . to rely on the vast body of law heretofore promulgated by the federal courts and the FTC by providing that existing interpretation by these entities shall be used "to the extent possible" in construing [the statute].

Id. at 848.

337. Barnhouse Motors, Inc. v. Godfrey, 577 S.W.2d 378 (Tex. Civ. App. 1979); Spradling v. Williams, 553 S.W.2d 143 (Tex. Civ. App. 1977); Chrysler-Plymouth City, Inc. v. Guerrero, 620 S.W.2d 700 (Tex. Civ. App. 1982); Myers v. Ginsberg, 735 S.W.2d 600 (Tex. Ct. App. 1987); Nagy v. First Nat'l Gun Banque Corp., 684 S.W.2d 114 (Tex. Ct. App. 1984); Fortner v. Fannin Bank in Windom, 634 S.W.2d 74 (Tex. Ct. App. 1982).

338. Hyder-Ingram Chevrolet, Inc. v. Kutach, 612 S.W.2d 687, 689 (Tex. Civ. App. 1981); Wagner v. Morris, 658 S.W.2d 230, 233 (Tex. Ct. App. 1983); Ybarra v. Saldana, 624 S.W.2d 948, 951 (Tex. Ct. App. 1981). Nondisclosure of a material fact is also deceptive under the TDTPA. *See* Robinson v. Preston Chrysler-Plymouth, Inc., 633 S.W.2d 500, 502 (Tex. 1982); First City Mortgage Co. v. Gillis, 694 S.W.2d 144, 146 (Tex. Ct. App. 1985); Gibbs v. Main Bank of Houston, 666 S.W.2d 554, 560 (Tex. Ct. App. 1984).

339. Nagy v. First Nat'l Gun Banque Corp., 684 S.W.2d 114, 116 (Tex. Ct. App. 1984). *See also* Chrysler-Plymouth City, Inc. v. Guerrero, 620 S.W.2d 700, 706 (Tex. Civ. App. 1982) (The court rejected a contention that a jury instruction was in error because it did not include a statement "that the person misled must be an *ordinary person* though ignorant, unthinking or credulous.") (emphasis added); Sam Montgomery Oldsmobile Co. v. Johnson, 624 S.W.2d 237, 241 (Tex. Civ. App. 1981); Spradling v. Williams, 553 S.W.2d 143, 145 (Tex. Civ. App. 1977); Fortner v. Fannin Bank in Windom, 634 S.W.2d 74, 78 (Tex. Ct. App. 1982).

both pre- and post-*Cliffdale* cases indicating that Texas is unlikely to accept the new deception standard.

D. Consistency with Federal Policies and Interpretations

The consumer statutes of Georgia,[340] Tennessee,[341] and Utah[342] provide that deceptive trade practices will be regulated in a manner "consistent" with the policies and interpretations of the Federal Trade Commission and the federal courts. The Tennessee Consumer Protection Act (TCPA) codified the liberal construction requirement,[343] and provides a detailed listing of deceptive trade practices.[344] This detailed listing does not include any specific mention of the "tendency or capacity" to deceive standard, and there have been no reported deception cases litigated under the TCPA. As a result, it is uncertain whether Tennessee will adopt the new deception standard.

The Utah Consumer Sales Practices Act of 1977 (UCPA), like the Tennessee statute, codifies the liberal construction requirement,[345] and provides a listing of deceptive trade practices without codifying the tendency to deceive standard.[346] Utah also has no case law indicating the appropriate burden of proof to be used in evaluating questionable trade practices under the statute. The UCPA does, however, require proof of intention to deceive and actual loss for a complainant to recover in a consumer private action case.[347] Even though these two requirements distinguish the Utah statute from most other consumer protection acts, the absence of case law makes it impossible to gauge the impact on state enforcement policy. Consequently, whether Utah will follow the *Cliffdale* deception standard remains an open question.

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340. "It is the intent of the General Assembly that this [statute] *be interpreted and construed consistently* with interpretations given by the Federal Trade Commission in the federal courts pursuant to Section 5(a)(1) of the Federal Trade Commission Act . . . ." GA. CODE ANN. § 10-1-391(b) (1981 & Supp. 1987) (current version at GA. CODE ANN. § 106-1201(b) (1984 & Supp. 1989)) (emphasis added).

341. "It is the intent of the general assembly that this [statute] shall *be interpreted and construed consistently* with the interpretations given by the federal trade commission and the federal courts pursuant to Section 5(A)(1) of the Federal Trade Commission Act . . . ." TENN. CODE ANN. § 47-18-115 (1984 & Supp. 1987) (emphasis added).

342. "This Act shall be construed liberally to promote the following policies: . . .(4) to make state regulation of consumer sales practices *not inconsistent with the policies of the Federal Trade Commission Act* relating to consumer protection." UTAH CODE ANN. § 13-11-2(4) (1986 & Supp. 1987) (emphasis added).

343. TENN. CODE ANN. § 47-18-102 (1984 & Supp. 1987).

344. *Id.* § 47-18-104.

345. UTAH CODE ANN. § 13-11-2 (1986 & Supp. 1987).

346. *Id.* § 13-11-4.

347. *Id.* § 13-11-4(2).

The Georgia Fair Business Practices Act of 1975 (GBPA) also mandates a liberal construction,[348] and includes a separate list of representative unfair and deceptive trade practices.[349] Despite these similarities with the Tennessee and Utah consumer protection statutes, Georgia courts deferred to federal policy to resolve specific trade practice questions. In some instances, those courts imposed more rigorous requirements on consumer plaintiffs than have been encountered in any other federal deference state.

In *Griffith v. Stovall Tire & Marine, Inc.*,[350] the buyer of a motor home sought to rescind a purchase contract, and appealed when summary judgment was entered against him.[351] Relying on the interpretation of an FTC regulation governing the assignation of model years to motor vehicles, the court held that the manufacturer had not violated the GBPA.[352] An initial evaluation of this strict adherence to federal enforcement policy would seem to indicate that Georgia courts are inclined to take a pro-consumer position in deceptive trade practice cases. This analysis would conform with the early recognition by Georgia courts that injured consumers have "an independent right to recover under the act, regardless of any other theory of recovery."[353] Georgia consumers, however, are also subject to two requirements that are unique to the enforcement of the GBPA and which are at variance with federal deception enforcement policy.

Although many of the consumer protection statutes with federal deference allowances include a "public interest" requirement,[354] the Georgia judiciary mandated that the questioned deceptive trade practice must have taken place "within the context of the consumer market place."[355] The two factors to be reviewed in deciding whether this requirement has been met are: (1) "the medium through which the act or practice is introduced into the stream of commerce;"[356] and (2) "the market on which the act or practice is reasonably in-

348. GA. CODE ANN. § 10-1-391(a) (1981 & Supp. 1987) (current version at GA. CODE ANN. § 106-1201 (1984 & 1989 Supp.)).

349. GA. CODE ANN. § 10-1-393 (1981 & Supp. 1987) (current version at GA. CODE ANN. § 106-1203 (1984 & Supp. 1989)).

350. 169 Ga. App. 461, 313 S.E.2d 156 (1984).

351. *Id.* at 461, 313 S.E.2d at 157.

352. *Id.* at 461-62, 313 S.E.2d at 157.

353. Attaway v. Tom's Auto Sales, 144 Ga. App. 813, 815, 242 S.E.2d 740, 742 (1978).

354. *See supra* notes 237-39 and accompanying text.

355. State v. Meredith Chevrolet, Inc., 145 Ga. App. 8, 11-12, 244 S.E.2d 15, 18 (1978). *See also* Larson v. Tandy Corp., 187 Ga. App. 893, 896, 371 S.E.2d 663, 666 (1988); Burdakin v. Hub Motor Co., 183 Ga. App. 90, 357 S.E.2d 839 (1987); Gross v. Ideal Pool Corp., 181 Ga. App. 483, 484, 352 S.E.2d 806, 808 (1987); DeLouch v. Foremost Ins. Co., 147 Ga. App. 124, 248 S.E.2d 193 (1978).

356. State v. Meredith Chevrolet, Inc., 145 Ga. App. 8, 12, 244 S.E.2d 15, 18 (1978).

tended to impact."[357] By having to show a marketplace effect, Georgia consumers are held to a more restrictive public interest requirement than in any other federal deference state.[358]

A second, and even more significant, deviation from federal deception enforcement policy involves the due diligence defense available to defendants in actions filed under the GBPA. In *Zeeman v. Black*,[359] the court held that the sale of a home was not in the conduct of business and therefore constituted a private action having no impact on the public interest.[360] The case involved an alleged misrepresentation, upon which the court relied to impose a significant burden on deceptive trade practice plaintiffs:

> [A] claimant who alleges the FBPA was violated as the result of a misrepresentation must demonstrate that he was injured as the result of the reliance upon the alleged misrepresentation. Therefore, . . . when the alleged violation of the FBPA is a misrepresentation, the claimant is not entitled to recover if he had an equal and ample opportunity to ascertain the truth but failed to exercise proper diligence to do so.[361]

Even though Georgia courts have not specifically addressed the appropriate deception standard to be followed under the GBPA, the due diligence defense recognized in the *Zeeman* case indicates that the Georgia statute is not construed as liberally to benefit consumers as is the case in most other states. Given that the due diligence requirement has been upheld in subsequent cases, and that Georgia courts have exhibited a strong propensity to follow federal policy, it is likely that Georgia will adopt the *Cliffdale* deception standard.

IV. Judicial Deference States

The Little FTC Acts of Louisiana,[362] North Carolina,[363] and

357. *Id.* at ___, 244 S.E.2d at 18.

358. *See* cases cited *supra* note 287.

359. 156 Ga. App. 82, 273 S.E.2d 910 (1980). *Cf.* Waller v. Scheen, 175 Ga. App. 1, 332 S.E.2d 293 (1985).

360. Zeeman v. Black, 156 Ga. App. 82, 85-86, 273 S.E.2d 910, 915 (1980).

361. *Zeeman*, 156 Ga. App. at 87, 273 S.E.2d at 916. *Accord* Nims v. Otter, 188 Ga. App. 516, 373 S.E.2d 396 (1988); Delta Chevrolet, Inc. v. Wells, 187 Ga. App. 694, 371 S.E.2d 250 (1988); Heidt v. Potamkin Chrysler-Plymouth, Inc., 181 Ga. App. 903, 354 S.E.2d 440 (1987). The *Zeeman* court adopted the due diligence requirement despite acknowledging the role of the federal act in deciding cases under the GBPA: "[N]ot only is the FBPA itself couched in terms of protecting the public interest, the comparable federal law, the Federal Trade Commission Act, . . . is expressly made the appropriate standard by which the purpose and intent of the Georgia Act is to be effectuated, implemented and construed." *Zeeman*, 156 Ga. App. at ___, 273 S.E.2d at 913.

362. Louisiana Unfair Practices and Consumer Protection Law, LA. REV. STAT. ANN. §§ 51:1401-1418 (West 1987).

Pennsylvania[364] do not contain explicit federal deference provisions. State courts in each of these jurisdictions, however, have judicially recognized the appropriateness of referring to federal interpretations when deciding deception cases. The Louisiana Unfair Trade Practices and Consumer Protection Law (LUTPL) includes proscriptive language that closely tracks the FTCA.[365] In *Guste v. Demars*,[366] the first case filed under the LUTPL, the court recognized the close connection between the state and federal statutes. In a benchmark ruling, the court expressed the opinion that state courts "may and should consider interpretations of the federal courts and of the Commission relative to such similar statutes to adjudge the scope and application of our own statute."[367]

Subsequent to the *Guste* judicial deference acknowledgement, a series of consumer protection cases arose in which the Louisiana courts recognized this mandate.[368] Although there are no reported deceptive trade practice cases under the LUTPL, Louisiana courts have deferred to federal standards in both antitrust[369] and unfair trade practice cases.[370] In both situations, the courts utilized the opportunity to incorporate federal antitrust and unfair trade practice policies as the appropriate governing standards under the LUTPL.

In the most recent case the deference procedure received perhaps its strongest endorsement when a Louisiana appellate court stated that: "Louisiana courts *give great deference* to determinations

363. North Carolina Consumer Protection Act, N.C. GEN. STAT. §§ 75-1 to 75-35 (1988).

364. Pennsylvania Unfair Trade Practices and Consumer Protection Law, PA. STAT. ANN. tit. 73, §§ 201-1 to 201-92 (Purdon Supp. 1989).

365. LA. REV. STAT. ANN. § 51:1405A (West 1987).

366. 330 So. 2d 123 (La. App. 2d Cir. 1976).

367. *Id.* at 125. *See also* First Fin. Bank, FSB v. Butler, 492 So. 2d 503 (La. Ct. App. 1986).

368. Stephenson v. Paine Webber Jackson & Curtis, Inc., 839 F.2d 1095, 1101 (5th Cir. 1988); Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1008 (5th Cir. 1981); Taylor v. First Jersey Sec., Inc., 533 So. 2d 1383, 1385 (La. Ct. App. 1988); State v. Orkin Exterminating Co., 528 So. 2d 198, 202 n.3 (La. Ct. App. 1988); First Fin. Bank, FSB v. Butler, 492 So. 2d 503, 505 (La. Ct. App. 1986); Huey T. Littleton Claims Serv., Inc. v. McGuffee, 497 So. 2d 790, 793 (La. Ct. App. 1986); Morris v. Rental Tools, Inc., 435 So. 2d 528, 533 (La. Ct. App. 1983); Gour v. Daray Motor Co., Inc., 373 So. 2d 571, 577-78 (La. Ct. App. 1979).

369. Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001 (5th Cir. 1981).

370. Crabtree Invs., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 577 F. Supp. 1466, 1469 (M.D. La. 1984); Gautreau v. Southern Milk Sales, Inc., 509 So. 2d 495, 497 (La. Ct. App. 1987); Crown Buick, Inc. v. Bercier, 483 So. 2d 1310, 1312 (La. Ct. App. 1986); Dufau v. Creole Eng'g, Inc., 465 So. 2d 752, 758 (La. Ct. App. 1985); Roustabouts, Inc. v. Hamer, 447 So. 2d 543, 548 (La. Ct. App. 1984); Coffey v. People's Mortgage & Loan of Shreveport, Inc., 408 So. 2d 1153, 1156 (La. Ct. App. 1981); Moore v. Goodyear Tire & Rubber Co., 364 So. 2d 630, 634 (La. Ct. App. 1978).

of unfair trade practices by the Federal Trade Commission."[371] Based on the strong history of judicial deference as applied to antitrust and unfair trade practice litigation, it appears likely that Louisiana will adopt the *Cliffdale* deception standard in an appropriate case.

The Pennsylvania Unfair Trade Practices and Consumer Protection Law (PUTPL)[372] was enacted in 1968. Although the statute does not include a federal deference provision, it does provide a detailed listing of prohibited deceptive and unfair trade practices,[373] including a catch-all provision that proscribes "any other fraudulent conduct which creates a likelihood of confusion or misunderstanding."[374] In one of the first cases litigated under the PUTPL, the court held that courts "may look to the decisions under the [FTCA] for guidance and interpretation."[375] Following that decision, a series of cases were litigated in the 1970s in which many aspects of the federal deception standard were adopted including: good faith is not a defense in a deception case;[376] intention to deceive is not required to establish a deception cause of action;[377] a representation that is literally and technically correct may still be deceptive if it is a partial truth;[378] and actual deception is not required in cases filed under the state statute.[379] Pennsylvania courts have also consistently recognized that the Little FTC Act is to be broadly construed and flexible in order to prevent easy evasion.[380]

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371. State v. Orkin Exterminating Co., 528 So. 2d 198, 202 n.3 (La. Ct. App. 1988) (emphasis added).

372. The current version of the Pennsylvania law appears at PA. STAT. ANN. tit. 73, §§ 201-1 to 201-9.2 (Purdon Supp. 1989).

373. PA. STAT. ANN. tit. 73, § 201-2 (Purdon Supp. 1989).

374. *Id.* § 201-2(4).

375. Commonwealth v. Hush-Tone Indus., Inc., 4 Pa. Commw. 1, 21 (1972).

376. Commonwealth v. Foster, 57 Pa. D. & C.2d 203 (1972).

377. *Id. See, e.g.*, Commonwealth *ex rel.* Zimmerman v. Nickel, 19 Mercer Co. L.J. 382, 26 Pa. D. & C.3d 115 (1983).

378. Commonwealth v. Foster, 57 Pa. D. & C.2d 203, 207-08 (1972). Pennsylvania courts have also held that the nondisclosure of a material fact is also deceptive under the PUTPL. *See* Commonwealth *ex rel.* Zimmerman v. Bell Tel. Co. of Pa., 121 Pa. Commw. 642, 647, 551 A.2d 602, 604 (1988) and Commonwealth v. Luther Ford Sales, Inc., 60 Pa. Commw. 123, 430 A.2d 1053 (1981).

379. *See* Commonwealth *ex rel.* Zimmerman v. Nickel, 19 Mercer Co. L.J. 382, 26 Pa. D. & C.3d 115 (1983).

380. Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 459, 329 A.2d 812, 817 (1974); Wright v. North American Life Assurance Co., 372 Pa. Super. 272, 280, 539 A.2d 434, 438 (1988); Gabriel v. O'Hara, 368 Pa. Super. 383, 389, 534 A.2d 488, 491 (1987); Culbreth v. Lawrence J. Miller, Inc., 328 Pa. Super. 374, 382, 477 A.2d 491, 495 (1984); Commonwealth *ex rel.* Zimmerman v. Bell Tel. Co. of Pa., 121 Pa. Commw. 642, 647, 551 A.2d 602, 604 (1988); Chatham Racquet Club v. Commonwealth, 116 Pa. Commw. 55, 541 A.2d 51, 53 (1988); Commonwealth v. National Apartment Leasing Co., 102 Pa. Commw. 623, 627, 519 A.2d 1050, 1052 (1986).

This strong judicial deference caseline culminated in a 1983 decision, *Commonwealth ex rel. Zimmerman v. Nickel*,[381] in which the court expressly adopted the federal tendency or capacity to deceive standard.[382] Since subsequent post-*Cliffdale* cases continued to acknowledge the need to liberally construe the PUTPL, and have not mentioned the reasonable consumer standard, it is unlikely that Pennsylvania will adopt the new deception standard.

In North Carolina, courts held that federal interpretations may be followed in deciding cases under the North Carolina Consumer Protection Act (NCCPA).[383] Consequently, courts ruled that under the NCCPA knowledge of falsity,[384] lack of intent,[385] and good faith[386] are not adequate defenses in deception cases. Courts also held that actual deception is not a prerequisite to establishing a cause of action under the Little FTC Act.[387] The adoption of significant parts of the federal deception standard culminated with judicial acknowledgement that a practice would be considered deceptive under the NCCPA if it had a tendency or capacity to deceive an average consumer.[388]

The traditional federal deception standard was first recognized in a 1980 case.[389] The case involved a plaintiff who filed suit to recover damages arising out of the unsuccessful effort to develop a

381. 19 Mercer Co. L.J. 382, 26 Pa. D. & C.3d 115 (1983).

382. *Id.* at 385, 26 Pa. D. & C.3d at 120. The *Zimmerman* court also adopted the federal unfairness standard. *Id.* at 385-86, 26 Pa. D. & C.3d at 120-21.

383. Marshall v. Miller, 302 N.C. 539, 542, 276 S.E.2d 397, 399 (1981); State *ex. rel.* Edmisten v. J.C. Penney Co., 292 N.C. 311, ____, 233 S.E.2d 895, 898 (1977); Hardy v. Toler, 288 N.C. 303, ____, 218 S.E.2d 342, 345 (1975); Cameron v. New Hanover Memorial Hosp., Inc., 58 N.C. App. 414, 443-44, 293 S.E.2d 901, 919 (1982).

384. Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985).

385. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

386. *Marshall*, 302 N.C. at 544, 276 S.E.2d at 399-400; LaNotte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 485, 350 S.E.2d 889, 892 (1986); Opsahl v. Pinehurst, Inc., 81 N.C. App. 56, ____, 344 S.E.2d 68, 76 (1986); Chastain v. Wall, 78 N.C. App. 350, 356, 337 S.E.2d 150, 153 (1985); Overstreet v. Brookland, Inc., 52 N.C. App. 444, 279 S.E.2d 1 (1981).

387. *See, e.g.*, Telephone Servs., Inc. v. General Tel. Co. of the South, 323 N.C. 472, 373 S.E.2d 440 (1988); Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755 (1986); Overstreet v. Brookland, Inc., 52 N.C. App. 444, 279 S.E.2d 1 (1981); Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980).

388. *See* cases cited *infra* note 395. *See also* Smith v. Central Soya of Athens, Inc., 604 F. Supp. 518 (E.D.N.C. 1985); Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174 (1986); Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981); Harris v. NCNB Nat'l Bank of North Carolina, 85 N.C. App. 669, 355 S.E.2d 838 (1987); LaNotte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986); Opsahl v. Pinehurst, Inc., 81 N.C. App. 56, 344 S.E.2d 68 (1986); Pinehurst, Inc. v. O'Leary Bros. Realty, Inc., 79 N.C. App. 51, 338 S.E.2d 918 (1986); Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985); Abernathy v. Ralph Squires Realty Co., Inc., 55 N.C. App. 354, 285 S.E.2d 325 (1982).

389. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980).

shopping center; the defendant insurance company tendered and then terminated a loan commitment.[390] The plaintiff argued that this practice was unfair and deceptive since it had a tendency or capacity to deceive.[391]

Despite a strong series of North Carolina cases upholding the traditional deception standard, the North Carolina Supreme Court stated in *State ex rel. Edmisten v. J.C. Penney Co.*[392] that federal court decisions "are not controlling in construing the North Carolina Act."[393] The court noted that the NCCPA, unlike other state trade regulation statutes, "does not require a direct reference to the FTC Act for its interpretation."[394] Although the *Edmisten* case could provide the basis for adoption of the *Cliffdale* deception standard, the series of cases decided during the last few years will likely foreclose the adoption of the new standard. These recent cases reaffirmed the tendency to deceive standard as the appropriate governing guideline under the NCCPA, and did not equate an average consumer with the reasonable consumer requirement, as set forth in the *Cliffdale* case.[395]

V. Conclusion

The change in federal deception standards brought about by the *Cliffdale* case is unfortunate for consumers. This ruling set the tone for regulatory policy regarding deceptive trade practices at both the federal and state levels. There seems to be little tangible evidence, however, that state courts are moving in the direction of adopting the new deception standard. At the present time, only five states appear inclined to adopt the *Cliffdale* holding, and only Vermont has openly endorsed the new standard in a post-*Cliffdale* case.

Another development directly linked to the Federal Trade Commission's less than vigorous enforcement of questionable trade activity is the increased activism of state attorneys general nationwide.

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390. *Id.* at 250-51, 266 S.E.2d at 613-14.
391. *Id.* at 265, 266 S.E.2d at 622.
392. 292 N.C. 311, 233 S.E.2d 895 (1977).
393. *Id.* at ____, 233 S.E.2d at 898.
394. *Id.* at ____, 233 S.E.2d at 898.
395. Marshall v. Miller, 302 N.C. 539, 542, 276 S.E.2d 397, 399 (1981); Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 265, 266 S.E.2d 610, 622 (1980); La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 485, 350 S.E.2d 889, 892 (1986); Opsahl v. Pinehurst, Inc., 81 N.C. App. 56, 344 S.E.2d 68 (1986); Pinehurst, Inc. v. O'Leary Brothers Realty, Inc., 79 N.C. App. 51, 59, 338 S.E.2d 918, 923 (1986); Chastain v. Wall, 78 N.C. App. 350, 356, 337 S.E.2d 150, 154 (1985); Abernathy v. Ralph Squires Realty Co., Inc., 55 N.C. App. 354, 357, 285 S.E.2d 325, 327 (1982); Overstreet v. Brookland, Inc., 52 N.C. App. 444, 452-53, 279 S.E.2d 1, 7 (1981).

Due to the decline of the FTC and other federal agencies as active regulators of business activities, the National Association of Attorneys General (NAAG) has proposed that states adopt stricter rules and regulations regarding certain types of advertising.[396] Advertisers have consistently argued that state attorneys general should not have the right to regulate national advertising since only the federal government has the authority to do so and can also insure a uniform enforcement policy.

Recently, the Department of Transportation (DOT), pursuant to authority granted by the Federal Aviation Act, threatened to invalidate state efforts to regulate certain types of air fare advertising by airlines.[397] The Act gives the Department of Transportation authority to regulate unfair or deceptive practices or unfair methods of competition.[398] Prior to its demise, the Civil Aeronautics Board (CAB) promulgated a rule that required that the entire price of a tour package be prominently displayed so that consumers would not be deceived about total cost.[399] The airlines had undertaken to feature only partial prices in the advertisement, which included percentage add ons in small print. Following the transfer of airline regulatory power from the CAB to the Department of Transportation, the DOT issued several orders that allowed airlines to unbundle various surcharges such as an international departure tax, and to state the cost of these charges elsewhere in the advertisement.[400]

On December 12, 1987, the National Association of Attorneys General adopted advertising guidelines that stated that this type of surcharge breakdown for air travel would be considered deceptive under state Little FTC Acts.[401] Airlines were subsequently informed by several states that these guidelines would be enforced, and in response, the DOT informed the states that "the federal government has preempted this aspect of state advertising regulation," and "if threats to enforce the particular sections of the guidelines continue, we will be forced to consider taking formal legal action to prevent their enforcement."[402] The states filed suit against the DOT, charging that the orders were issued in violation of proper notice and comment procedures, while the DOT argued that the states lacked

396. Wall St. J., Feb. 2, 1989, at B6, col. 3.
397. Alaska v. U.S. Dep't of Transp., 868 F.2d 441, 442-43 (D.C. Cir. 1989).
398. 49 U.S.C. app. § 1381 (1982).
399. Alaska v. U.S. Dep't of Transp., 868 F.2d 441, 442 (D.C. Cir. 1989).
400. *Id.*
401. *Id.*
402. Alaska v. U.S. Dep't of Transp., 868 F.2d 441, 442-43 (D.C. Cir. 1989).

standing to bring the action.[403] In a major setback for advertising groups, the District of Columbia Court of Appeals ruled in favor of the states as to both issues.[404]

This case will almost certainly have profound consequences for the FTC's policy regarding regulation of deceptive trade practices. The federal courts do not appear to share the view that it is absolutely essential that national advertising policy be maintained uniformly by federal agencies. Had the District of Columbia Court of Appeals ruled differently, the impact would have been dramatic relative to the continued viability of federal deference provisions contained within state Little FTC Acts. In effect, if the states can be prohibited from regulating advertising that is national in scope, the question of whether state courts should follow interpretations rendered by the FTC and federal courts is moot. Although former Chairman Miller would undoubtedly endorse the effort to remove such advertising from the purview of state regulation, state consumers will be better served by continued resistance to the *Cliffdale* deception standard and a vigorous application of Little FTC Acts to questionable trade practices.

403. *Id.* at 441.
404. *Id.*

CLASSIFICATION OF STATE FEDERAL
DEFERENCE PROVISIONS

			DEFERENCE LANGUAGE								
	STATUTORY DEFERENCE	JUDICIAL DEFERENCE	CONSIDERATION	DUE CONSIDERATION AND GREAT WEIGHT	MANDATORY GUIDANCE	OPTIONAL GUIDANCE	GUIDANCE TO THE EXTENT POSSIBLE	CONSISTENCY WITH FEDERAL RULES	STATUTORY RULEMAKING POWER
ALABAMA	X			X					
ALASKA	X			X					
ARIZONA	X					X			
CONNECTICUT	X				X				X
FLORIDA	X			X					X
GEORGIA	X							X	
IDAHO	X			X					X
ILLINOIS	X		X						
LOUISIANA		X				X			
MAINE	X				X				X
MARYLAND	X			X					
MASSACHUSETTS	X				X				X
MONTANA	X			X					X
NEW HAMPSHIRE	X					X			
NEW MEXICO	X						X		
NORTH CAROLINA		X				X			
OHIO	X			X					
PENNSYLVANIA		X				X			
RHODE ISLAND	X			X					
SOUTH CAROLINA	X				X				
TENNESSEE	X							X	
TEXAS	X						X		
UTAH	X							X	
VERMONT	X				X				X
WASHINGTON	X				X				
WEST VIRGINIA	X				X				X

APPENDIX A

STATE DECEPTION STANDARD CASE LAW

	TENDENCY OR CAPACITY CASELAW	UNSOPHISTICATED CONSUMER CASELAW	PRE CLIFFDALE DECEPTION CASELAW	POST CLIFFDALE DECEPTION CASELAW	ADOPTING CLIFFDALE		
					UNLIKELY	LIKELY	UNCERTAIN
ALABAMA							X
ALASKA	X		X			X	
ARIZONA	X	X	X	X	X		
CONNECTICUT	X	X	X	X			X
FLORIDA					X		
GEORGIA						X	
IDAHO	X		X		X		
ILLINOIS	X	X	X	X	X		
LOUISIANA						X	
MAINE	X		X			X	
MARYLAND	X	X		X	X		
MASSACHUSETTS			X	X	X		
MONTANA							X
NEW HAMPSHIRE							X
NEW MEXICO	X			X	X		
NORTH CAROLINA	X		X	X	X		
OHIO	X		X	X	X		
PENNSYLVANIA	X		X	X	X		
RHODE ISLAND							X
SOUTH CAROLINA	X		X	X	X		
TENNESSEE							X
TEXAS	X		X	X	X		
UTAH							X
VERMONT	X			X		X	
WASHINGTON	X		X	X	X		
WEST VIRGINIA			X				X

APPENDIX B